IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 802

MASSACHUSETTS MUTUAL LIFE INSURANCE CAMPANY,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION and THE LACLEDE GAS LIGHT COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Massachusetts Mutual Life Insurance Company respectfully prays that a writ of certiorari issue to review the judgment entered October 30, 1945, by the Circuit Court of Appeals for the Eighth Circuit (R. p. 229) and from the Order Denying Petition for Rehearing entered by that court November 28, 1945 (R. p. 265).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA Sec. 347, 8 F. C. A. Title 28, Sec. 347), the provisions of which are made applicable by Section 25 of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 USC Sec. 79a et seq.).

QUESTIONS PRESENTED.

(1) Whether the Circuit Court of Appeals in considering the possibility of alleged potential bankruptcy in determining what is fair and equitable did not commit error in conflict with the decision of this Court in Case v. Los Angeles Lumber Co., 308 U. S. 106, 123, where this Court said:

> "The fact that bondholders might fare worse as a result of foreclosure and liquidation than they would be taking a debtor's plan under Sec. 77B can have no relevant bearing on whether a proposed plan is 'fair and equitable' under that section. Submission to coercion is not the application of 'fair and equitable' standards. Such a proposition would not only drastically impair the standards of 'fair and equitable' as used in Sec. 77B; it would pervert the function of the Act."

(2) Whether the Circuit Court of Appeals erred in failing to reverse the District Court because the District Court did not resolve the dispute as to whether or not the lien of the 1919 Bondholders extended to the electric properties since the District Court considered the question a "collateral issue" and whether such failure is not in conflict with the decision of this Court in Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., 318 U. S.

523, where the District Court had not undertaken to resolve a dispute as to the extent of a lien and this Court said:

> "Here as in the Consolidated Rock Products Co. case the 'determination of what assets are subject to the payment of the respective claims' has a direct bearing on the fairness of the plan as between two groups of bondholders. The District Court should resolve the dispute."

(3) Whether the Circuit Court of Appeals misconstrued and misapplied the absolute priority doctrine in conflict with the decisions of this court, particularly in that the Circuit Court of Appeals found that "the due date fixed in the contract in this case cannot be urged * * * as the basis for a claim for interest payments," and in that it affirmed the position of the District Court and the Commission "that the mortgage clause providing for redemption payments is not applicable" and in that it affirmed the District Court in finding that the fair equivalent of the claims of the 1919 bondholders was 100 without any allowance to these bondholders for the loss of their senior rights?

(4) Whether the holding of the Circuit Court of Appeals that the standard of necessity provided in Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 as follows "To require * * * that each registered holding company and each subsidiary company thereof, shall take such **steps** as the Commission shall find **necessary** * * *" does not require payment of the premiums on the 1919 Bonds of Laclede Gas where Laclede Gas has sufficient funds to pay such premiums (and such funds have been deposited in escrow for that purpose depending on this appeal) for the reason the standard of necessity "is not applicable to the details of the plan,"

is not an erroneous construction of the statute and a decision of federal law which has not been previously settled?

(5) Whether the holding of the Circuit Court of Appeals that the term "security holders" as used in that portion of Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 which reads "Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company * * *" can apply "only to security holders continuing as such in the reorganized corporation" and not to security holders existing prior to the consummation of the reorganization plan, is not an erroneous construction and application of the statute and a decision of federal law which has not been previously settled?

(6) Whether the holding of the Circuit Court of Appeals construing Section 26 (c) of the Public Utility Holding Company Act of 1935 as making illegal the contractual provision for redemption premiums and concluding that, therefore, the 1919 Bondholders should be paid nothing above face value and accrued interest is not an erroneous construction and application of the Act as applied to a continuing operating utility and a decision of federal law which has not been previously settled?

(7) Whether the Circuit Court of Appeals erred in failing to reverse the judgment of the District Court because that Court did not independently determine whether the plan proposed was fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act as required by Section 11 (e) of the Public Utility Holding Company Act but instead accepted the findings of the

Commission on these questions as conclusive and going so far as to say "Orders otherwise beyond the power of the Commission become valid when based upon appropriate findings by the Commission"?

(8) Whether the Circuit Court of Appeals erred in failing to reverse the District Court for finding as a Conclusion of Law that "The Commission's order of May 20, 1943, under Section 11 requiring Laclede Gas to recapitalize and substantially reduce its debt and requiring Ogden to divest itself of its interests in Laclede Gas and Laclede Electric, * * * is not reviewable by this Court because under Section 24 (a) of the Act such order is reviewable only in a Circuit Court of Appeals, and only within sixty days of the entry thereof, which period has long since expired," and in finding that said order of May 20, 1943, is final for the reason that such conclusion is in conflict with decisions by Circuit Court of Appeals for the Third Circuit in Lownsbury et al. v. SEC, 151 F. (2d) 217, and in Commonwealth and Southern Corp. v. S. E. C., 134 F. (2d) 747, and by the Circuit Court of Appeals for the Second Circuit in Okin v. SEC, 145 F. (2d) 206?

STATUTES INVOLVED.

Sections 11 (b) (2), 11 (e), 24a and 26 (c) of the Public Utility Holding Company Act of 1935 [15 U. S. C. A., secs. 79k (b) (2), 79k (e), 79x and 79z (c), August 26, 1935, c. 687, Title I, Sections 11 (b) (2), 11 (e), 24a and 26 (c), 49 Stat. 820, 834, 835], are involved. They are as follows:

> 11 (b) (2) "To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company sys-

tem does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company."

* * * * * * *

11 (e) "In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this

chapter, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."

* * * * * * *

"24 (a) Any person or party aggrieved by an order issued by the Commission under this chapter may obtain a review of such order in the Circuit Court of Appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part * * *."

* * * * * * *

26 (c) "Nothing in this chapter shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this chapter, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of

which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this chapter or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this chapter or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien. Aug. 26, 1935, c. 687, Title I, § 26, 49 Stat. 835."

STATEMENT.

The Massachusetts Mutual Life Insurance Company, a bondholder and creditor of the Laclede Gas Light Company, filed objections in the United States District Court for the Eastern District of Missouri to a plan of reorganization of Laclede Gas Light Company initiated before and approved by the Securities and Exchange Commission under Sections 11 (b) (2) and 11 (e) of the Public Utility Holding Company Act of 1935 [Aug. 26, 1935, c. 687, Title I, § 11, 49 Stat. 820, 15 U. S. C. A., § 79k] insofar as said plan of reorganization provided that the 1919 bonds of The Laclede Gas Company should be retired without the payment of redemption premiums payable under the terms of the 1919 bonds and the mortgage securing said bonds.

The Laclede Gas Light Company (hereinafter referred to as "Laclede Gas") is a Missouri corporation, incorporated by a special act of the Missouri Legislature on March 2, 1857. It is engaged in the manufacture of gas, the distribution and sale of mixed, manufactured and natural gas, and the distribution and resale of natural gas (for industrial purposes only), all within the corporate limits of the City of St. Louis, Missouri (R. p. 12).

The security structure of Laclede Gas (as of December 31, 1943) was as follows (R. p. 13):

On April 1, 1904, Laclede Gas executed a mortgage to secure an issue of $20,000,000 refunding and extension mortgage 5% gold bonds due April 1, 1934. $10,000,000 of these bonds were held under a subsequent mortgage executed in 1919 (R. p. 16), and $8,961,105 of these bonds, which were extended to April 1, 1945 (R. p. 13), were publicly owned.

There was outstanding $17,500,000 of bonds of Series "C" (due February 1, 1953) and $5,500,000 of bonds of Series "D" (due February 1, 1960) of the First Mortgage Collateral and Refunding 5½% Gold Bonds (herein referred to as the "1919 Bonds") issued under the mortgage executed by Laclede Gas on January 1, 1919 (R. p. 13). The mortgage securing the 1919 Bonds provides that such bonds "may be redeemed by the Company at any time at par and accrued interest and such premiums, if any, as the Board of Directors may determine at the time of the issuance of said bonds" (R. p. 42). There is no other provision for acceleration of maturity. The redemption premium on the Series C bonds due 1953, outstanding in the principal amount of $17,500,000 is 2% during 1944, and the premium on the Series D bonds outstanding in the principal amount of $5,500,000 is 4% during 1944, aggregating $570,000 (R. p. 42). It is the payment of these redemption premiums that is involved in this appeal.

In 1935 Laclede Gas issued collateral trust 6% notes in the amount of $3,000,000, $1,000,000 of which have been retired and the remaining $2,000,000 of the notes extended to August 1, 1945 (R. p. 16).

There was outstanding 23,330 shares of 5% cumulative preferred stock of $100 par value, on which there was an arrearage of $50.83 per share (R. p. 13). There was also outstanding 107,000 shares of common stock, par value $100 (R. p. 13).

Laclede Power & Light Company (hereinafter referred to as Laclede Electric), a Missouri corporation organized

in 1926, is an electric utility company engaged in the generation, transmission and sale of electric energy within the corporate limits of the City of St. Louis, with a line crossing Mississippi River to Granite City, Illinois, for a very minor part of its property. A part of its facilities is leased from Laclede Gas under an agreement entered into in 1926 and expiring in 1953 (R. p. 13). The trustee of the 1919 Bonds of Laclede Gas has taken the position for many years that the electric properties of Laclede Electric are security for the 1919 Bonds (R. p. 32). In 1936 Laclede Electric commenced suit against the trustees under 1904 and 1919 mortgages of Laclede Gas for a declaratory judgment to exclude the addition it had made to Laclede Gas' electric properties from the lien of said mortgages. After the trustees in said mortgages filed their answers, Laclede Electric dismissed the suit (R. pp. 194-195).

Laclede Electric had, as of December 31, 1943, 35,993 shares of no par value common stock outstanding (R. p. 14). It had issued no mortgage, but had a 6% demand note in the amount of $705,000 and an open account debt of $200,000 both with the Ogden Corporation (R. p. 14).

Ogden Corporation (referred to as Ogden) is a registered holding company under the Public Utility Holding Co. Act of 1935, and a Delaware corporation. Ogden is the parent of Laclede Gas, Laclede Electric and numerous other utility and non-utility companies (R. p. 14).

As of December 31, 1943, Ogden owned the following interests in Laclede Gas: Ogden owned 73.51% of Laclede Gas' outstanding voting securities. Such voting securities consist of 5,345 shares, or 29.9% of the 23,330 outstanding shares of the 5% cumulative preferred stock, par value $100, and 90,466 shares, or 84.5% of the 107,000 outstanding shares of common stock, par value $100. Ogden also owned all the collateral trust 6% notes extended to August 1, 1945, outstanding in the principal amount of $2,000,000, and $200 principal amount of the 1919 Bonds (R. p. 14).

Ogden owned 35,727 shares of the common stock, or 99.2% of the 35,993 outstanding shares, a 6% demand note in the amount of $705,000, and an open account debt of $200,000, of Laclede Electric (R. p. 15).

Ogden came into being as a result of a plan of reorganization, pursuant to Section 77B of the Bankruptcy Act as amended, of Utilities Power & Light Corporation (herein called "Utilities"), a registered holding company, which was formerly parent of Laclede Gas and Laclede Electric (R. p. 14). The plan filed by "Utilities" and approved in the reorganization proceedings and approved by the Securities & Exchange Commission (sometimes herein referred to as "Commission") provided that Ogden would acquire the securities of Laclede Gas and Laclede Electric and other assets of Utilities, register as a public utility holding company under the Act, and then convert itself into an investment company as distinguished from a public utility holding company through the sale or other disposal of the Laclede Gas and Laclede Electric securities and other utility and holding company securities acquired by it from Utilities (R. pp. 198-199).

On September 4, 1941, Ogden, Laclede Gas and Laclede Electric voluntarily filed a Section 11 (e) plan under the Act (R. p. 4). On February 27, 1943, Ogden and all of its subsidiaries filed a plan under Section 11 (e) of the Act (R. p. 200). On March 22, 1943, the Commission instituted a mandatory proceeding against Ogden and all of its subsidiaries under Sections 11 (b) (1), 11 (b) (2), 15 (f) and 20 (a) of the Act (R. p. 200). These three proceedings were consolidated (R. p. 200) and out of the consolidated proceedings came an order of May 20, 1943 (R. pp. 85-89), which directed Ogden to eliminate itself as a public utility holding company. Laclede Gas was directed to recapitalize "so as to distribute voting power fairly and equitably among the security holders" and to include in the recapitalization a substantial reduction in its

debt, the elimination of preferred stock arrears, and the conversion of the outstanding preferred and common stock into a single class of stock. The order did not direct or mention the retirement of the Laclede Gas Bonds, or any method of reducing the debt.

The voluntary plan filed by Laclede Gas, Ogden and Laclede Electric on September 4, 1941, underwent a number of amendments up to January 24, 1944 (R. pp. 4-6). The Commission finally held hearings (R. p. 5) on the plan as so amended. The plan so amended provided in substance (R. pp. 21-22):

> "1. Sale of the electric properties operated by Laclede Electric, including properties leased from Laclede Gas, to Union Electric, at a base sale price of $8,600,000, and allocation of $2,200,000 of such sales price of Laclede Gas as its share of such proceeds of sale;
>
> "2. Transfer to Laclede Gas by Laclede Electric of its remaining assets (except cash and the 233,112 voting trust certificates of Granite City Generating Company, which certificates are to be transferred to Ogden) estimated, as of December 31, 1943, at approximately $14,300 and the dissolution of Laclede Electric, after the discharge of its liabilities;
>
> "3. Issuance of eleven shares of new common stock of Laclede Gas, $4 par value per share, in exchange for each share of present 5% Cumulative Preferred Stock, $100 par value, of Laclede Gas, and the issuance of one share of new common stock of Laclede Gas, $4 par value, in exchange for each share of present common stock of Laclede Gas, $100 par value;
>
> "4. Issuance to Ogden (in addition to 149,261 shares to be received by it in exchange for its present holdings of Laclede Gas preferred and common stocks in the ratio provided for the No. 3 above) of 2,000,000 shares of new common stock of Laclede Gas, $4 par value, in return for:

"(a) Cancellation of $2,000,000 principal amount Collateral Trust 6% Notes of Laclede Gas owned by Ogden, after payment of accrued interest thereon to the effective date of the plan;

"(b) Payment to Laclede Gas by Ogden of $905,000 cash;

"(c) Payment to Laclede Gas of Laclede Electric's share of the cash proceeds from the sale of the electric properties, less such portion of such proceeds necessary to discharge in full all liabilities of Laclede Electric not assumed by Union Electric: such payment to Laclede Gas is estimated to be $6,175,000 as of May 31, 1943;

"(d) Assets transferred to Laclede Gas by Laclede Electric as provided in paragraph No. 2 above;

"It is provided in the plan that if the cash payment mentioned in (c) above falls below $5,975,000, the number of shares issuable to Ogden will be decreased by a number of shares which, in the opinion of the proponents of the plan, will fairly compensate for any such decrease in the amount of cash to be received by Laclede Gas; or, if Ogden so elects, it will pay to Laclede Gas in cash a sum sufficient to increase to $5,975,000 the amount of cash to be received by Laclede Gas. The maximum cash payment to Laclede Gas is to be $6,175,000. Any cash remaining in Laclede Electric's treasury after such maximum payment thereof is to be distributed pro rata to the stockholders of Laclede Electric.

"5. Payment by Ogden to the minority holders of the stock of Laclede Electric, upon surrender for cancellation of such stock of a cash amount equal to their prorate share in the net assets of Laclede Electric after the consummation of the sale, and after payment to Laclede Gas of its share of the proceeds of such sale $2,200,000;

"6. Sale by Laclede Gas of $19,000,000 principal amount of new first mortgage bonds and $3,000,000 principal amount of serial debentures, and the use

of the proceeds together with other available cash, as hereinafter in paragraph 7 set forth;

"7. Payment and discharge, at the principal amount thereof, together with accrued interest thereon to the effective date of the plan, of Laclede Gas 1904 5% Bonds outstanding in the hands of the public, and its outstanding 1919 5½% Bonds aggregating $31,961,105 principal amount, as of December 31, 1943;

"8. Sale by Ogden of all of the new common stock, which it will acquire by virtue of Laclede Gas' reorganization to the public."

On May 24, 1944, the Commission entered its findings and opinion (R. pp. 8-58), in which it found the plan necessary to effectuate the provisions of Section 11 (b) (R. p. 24) and found that the plan would be fair and equitable (R. pp. 39, 43) to the persons affected thereby if it were modified to provide (in addition to certain incidental modifications) that the holders of the 5% Preferred stock of Laclede Gas receive 14 rather than 11 shares of the new common stock of Laclede Gas, in exchange for each share of such preferred stock and accumulated unpaid dividends thereon (R. p. 37).

The suggested modifications were made by amendment to the Plan and on May 27, 1944, the Commission issued its order (R. p. 67) approving the plan, conditioned upon an enforcement order by a District Court proceeding. The language used is as follows (R. p. 71):

"That this order shall not be operative to authorize the consummation of transactions proposed in the plan as amended until an appropriate federal district court shall, upon application thereto, enter an order enforcing such plan."

Some of the findings of the Commission which are pertinent in this appeal are as follows (R. p. 15):

"The comprehensive proposals before us for the reorganization of Laclede Gas and the sale of the electric properties operated by Laclede Electric are necessitated by a number of pressing financial problems facing the applicants. These problems relate to Laclede Gas' excessive debt and to the impending maturity in 1945 of a substantial portion of such debt, the inability of Laclede Gas since 1933 to pay any dividends on its outstanding preferred and common stocks, the need to sell the electric properties operated by Laclede Electric in order, among other things, to raise funds to reduce Laclede Gas' excessive debt, Ogden's obligations under Section 11 (b) (1) of the Act to dispose of its interests in Laclede Gas and Laclede Electric, the presence of large amounts of inflationary items in Laclede Gas' asset accounts, and the inequitable distribution of voting power existing among Laclede Gas' security holders. These and other related problems facing the applicants are summarized below."

The Commission found (R. p. 35) that there were "possibilities of bankruptcy" of Laclede Gas and that if bankruptcy would occur the 1919 bonds would be accelerated and that the claim of the 1919 Bondholders "would be measured by the principal amount, exclusive of redemption premium." The Commission found that the dispute as to whether the lien of the 1919 bonds extended to the electric properties should be eliminated to enable Ogden to solve its problems (R. p. 45).

As to the fairness and equitableness of the proposed plan to the stockholders of Laclede Gas, the Commission found that both the preferred and common stock in their then present condition were in non-marketable form, that dividends had not been paid since 1933 (R. p. 17) and that, absent reorganization, would not be paid "for many years to come" (R. p. 17). On the basis of the plan (as required to be amended) the Commission found that "the reason-

ably prospective earnings per share of new common stock would be 37¢ to 41.1¢. On this basis, each share of preferred would have applicable to it between $5.18 and $5.75 of reasonably prospective earnings, as compared with its "annual $5.00 dividend preference" (R. p. 37). The Commission concluded, "There is little question that, as an investment, fourteen shares of such new common stock are, in fact, superior to one share of the present preferred stock whose holder has been forced and, absent reorganization, * * * will be forced to forego any return on his security for many years. Similarly, it is our opinion that the new common stock of the reorganized company provides the present common stockholder with a security of a caliber substantially superior to that of his present security" (R. p. 39).

As to the relationship between the preferred and common stock inter sese, the Commission found that the preferred stock had no liquidating preference over the common stock (R. pp. 33-34). The Commision concluded: "We are of the opinion, however, that under the circumstances of the present case and where the common stock is permitted to participate on a substantial basis as compared with the preferred, fairness requires that the reasonably prospective earnings applicable to the participation accorded the preferred stock should not be less than the preferred's present priority upon earnings" (R. p. 36).

As to the retirement of the 1919 Bonds without the payment of the redemption premiums, the Commission concluded that "the retirement of the 1919 bonds is a proximate result of the necessity of reducing Laclede Gas' indebtedness, and the sale of the electric properties to raise the cash necessary for that purpose" (R. p. 44). It also stated that a "solution of Ogden's problems" necessitated the retirement of the 1919 bonds (R. p. 45). The Commission stated that the "method of retiring all of the

1919 bonds may not be the only possible method to prevent a windfall and insure that the 1919 bonds will not receive unduly favorable treatment at the expense of the stockholders" (R. p. 44). The Commission concluded "that the retirement of the 1919 bonds by Laclede Gas is not primarily ascribable to a desire on the part of Laclede Gas stockholders to obtain cheaper money but is attributable to the requirements of Section 11 (b), and that, therefore, the premium as such is not payable. We also find that payment of principal amount and accrued interest to the effective date of the plan * * * is the fair equivalent of the rights of the 1919 bondholders and that, therefore, such payment would be fair and equitable" (R. pp. 42-43).

As to Ogden, the Commission concluded (R. pp. 38-39): "It appears plain that the plan confers distinct benefits upon Ogden in converting its non-marketable investments in the Laclede companies into marketable securities with substantial applicable earnings and immediate dividend prospects."

The Commission applied (R. p. 3) to the United States District Court for the Eastern District of Missouri for an order to enforce and carry out the plan as provided in Section 11 (e) of the Act. Order was entered requiring objections to be filed on June 27, 1944, and hearing was set for June 30, 1944 (R. p. 89). Appellant and other objectors filed written objections (R. p. 90 et seq.), raising only matters appearing on the face of the findings, opinion and order of the Commission. Hearing was had on June 30, 1944, and July 1, 1944 (R. p. 97).

RULINGS OF THE COURT BELOW.

The District Court filed its statement, opinion, findings of fact and conclusions of law on August 25, 1944 (R. pp. 98-135), in which the Court accepted as conclusive on it the Commission's determination that the plan was fair and equitable and appropriate to effectuate the provisions

of Section 11 of the Act, and made other rulings not necessary to set out here, and directed an order be entered to enforce the provisions of the plan (R. p. 135). No such order was entered, as Laclede Gas, Laclede Electric and Ogden applied to the Court for leave to amend the plan so as to enable the plan to be consummated at the earliest possible date without waiting for an appeal to determine the rights of objecting bondholders (R. pp. 137-139). The application was granted, and December 4, 1944, was set for hearing on application to enforce the amended plan approved by the Commission and objections were required to be filed by December 4, 1944 (R. p. 136). The proponents submitted a plan (R. p. 154 et seq.) (known as Amended Plan of November 16, 1944), to the Commission, which provided, in effect (R. pp. 168-170), that Laclede Gas would deposit in escrow with the Trustee of the 1919 mortgage a sum sufficient to cover (1) the aggregate amount of the premiums that would be payable under the terms of the 1919 mortgage in the event the 1919 bonds were redeemed pursuant to the terms of the mortgage on the effective date of the Amended Plan, (2) interest for a period of three years, at the rate of 5½% per annum on the amount of the premiums, and (3) an amount sufficient to defray reasonable fees and expenses of the Trustee in connection with the escrowed funds. In the event that a final judicial determination should hold that the premiums on the 1919 bonds should be paid, then the premiums would be paid from the escrowed fund to the 1919 bondholders, together with interest on the amount of the premiums, at the rate of 5½% per annum from the effective date of the Amended Plan to the date when the funds became available for payment of the premiums. If it should be determined that the premiums are not payable, then the escrowed funds (less Trustee expense and fees) would be returned to Laclede Gas. The Amended Plan also

provided that holders of the 1919 bonds could accept payment of the principal and interest on their bonds without waiving their right to be paid the premiums and interest thereon in the event that a final judicial determination required payment of the premiums.

On December 2, 1944 (R. p. 152), the Commission approved the plan as amended November 16, 1944. Appellant and others filed written objections, raising only matters appearing on the face of the findings, opinion and orders of the Commission. Hearing was had on December 4, 1944, and on that date (R. pp. 170-177) the District Court entered its Supplemental Findings of Fact and Conclusions of Law (R. p. 177), and Order No. 1 (R. p. 185) and Order No. 2 (R. p. 182) approving the plan. Order No. 1 dealt with the features of the plan other than the retirement of the 1919 bonds and the payment of the redemption premiums thereon; this was specifically excluded from Order No. 1 (R. p. 188).

Order No. 2, which the order appealed from, decreed, in paragraph (1) (R. p. 184), that subparagraph (c) of paragraph 12, of Article I of the Amended Plan, providing for the retirement of the 1919 bonds without the payment of the redemption premiums, was fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act.

Part of this Order not appealed from (paragraph 2) (R. pp. 184-185) provides that any of the bondholders had the right to appeal from said Order No. 2, and that a determination, on the appeal by any bondholder, that subparagraph (c) of paragraph 12 of Article I of said Amended Plan was not fair and equitable or not appropriate to effectuate the provisions of Section II of the Act would be binding as to all bondholders and that all bondholders would then be entitled to the premiums and interest thereon from the escrowed deposit.

In its opinion, findings of fact and conclusions of law,

the District Court found that the retirement of the 1919 bonds, without the payment of premiums, was not a voluntary retirement, but was attributable to Section 11(b) of the Act and that, therefore, the premiums were not payable, that the Commission's findings that the payment of the 1919 bonds at the principal amount of the bonds with accrued interest to effective date of the plan without the payment of premiums was the fair equivalent of the rights of the 1919 bondholders was supported by substantial evidence and was "conclusive" upon the Court (Conclusions of Law, VII and VIII, R. p. 134), that "The Commission found the plan was 'entirely appropriate' to comply with its orders. These are matters peculiarly within the discretion and powers of the Commission, and if based on evidence, we deem this court bound by the finding" (R. p. 113), that the order of May 20, 1943, "is not reviewable by this court because, under Section 24(a) of the Act such order is reviewable only in a Circuit Court of Appeals, and only within sixty days of the entry thereof, which period has long since expired" (Conclusions of Law, IX, R. p. 133), and "Let not the effect on this case of the finality of the findings and order in the consolidated case be overlooked * * * no appeal having been taken by them in the consolidated case and time for appeal having expired, it is a matter of serious doubt whether they are now in a position to complain of findings and orders in the consolidated case, which are now in this case if made to carry out the provisions of the order made by the Commission in the consolidated case". (R. p. 110.) That the issue of whether or not the lien of the 1919 bonds extended to the electric properties was a "collateral issue" and "certainly this court can not now try that collateral issue" (R. p. 114), that the possibility of bankruptcy, absent reorganization, is a factor in determining fairness and equitableness (R. pp. 115-116), that "Orders, other-

wise beyond the powers of the Commission, became valid when based upon appropriate findings by the Commission" (R. p. 121), that Section 26 (c) of the Act did not apply where bonds were called "involuntarily" by force of the Act (R. pp. 121-125).

The Circuit Court of Appeals for the Eighth Circuit affirmed (R. p. 220) the judgment of the District Court on October 30, 1945, (Petition for Rehearing denied November 28, 1945 [R. p. 265]), with the opinion being written by Judge Thomas, in which it was stated, "Since there is a 'rational basis' in fact for the finding of the Commission and no 'clear-cut' error of law by either Commission or court, we are not inclined to disturb the conclusion that retirement of the bonds at principal and accrued interest amounts to the 'equitable equivalent of the rights surrendered' ". (R. p. 216.) The Circuit Court of Appeals approved the use of alleged potential bankruptcy as a factor in determining fairness (R. p. 215), the conclusion that the call premiums are "neither a factor in nor a measure of a fair amount to be paid the bondholders on retirement of their bonds" (R. p. 215). It further held that "The due date fixed in the contract in this case can not be urged, * * *, as the basis for a claim for interest payments" (R. p. 216), that the term "security holders" in the exception clause in Section 11(b) (2) of the Act providing that the corporate structure of an operating company can be changed only for the purpose of "fairly and equitably distributing voting power among the security holders" applies only to those who "continue to be security holders after the plan is put into operation", and not to those who were security holders up to the time of the consummation of the plan, when they were eliminated (R. p. 218), that the standard of necessity required by Section 11(b) (2) of the Act "is not applicable to the details of the plan" such as the question of the necessity of retiring the bonds without payment

of premiums where the Company had sufficient funds to make such payments (R. p. 214).

REASONS FOR GRANTING.

(1) The Circuit Court of Appeals held that the possibility of bankruptcy of Laclede Gas Light Company was a factor to be considered in determining what was the fair and equitable equivalent of the rights of the 1919 Bondholders of the Laclede Gas Light Company. In Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 123, this Court said:

> "The fact that bondholders might face worse as a result of foreclosure and liquidation than they would be taking a debtor's plan under Sec. 77B can have no relevant bearing on whether a proposed plan is 'fair and equitable' under that section. Submission to coercion is not the application of 'fair and equitable' standards. Such a proposition would not only drastically impair the standards of 'fair and equitable' as used in Sec. 77B; it would pervert the function of the Act."

In Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, this court stated that the term "fair and equitable" in the Public Utility Holding Company Act incorporates the principle of full priority and cites Case v. Los Angeles Lumber Products Co., supra, as an application of this doctrine. The decision of the Circuit Court of Appeals is probably in conflict with that applicable decision of this Court.

(2) The District Court did not resolve the dispute as to whether or not the lien of the 1919 bondholders of Laclede Gas Light Co., extended to the electric properties because it considered that question to be a "collateral issue." The Circuit Court of Appeals did not reverse the District Court for this failure to resolve the dispute. In Group of

Institutional Investors v. Chicago, M., St. P. & P. Ry., 318 U. S. 523, where a District Court had not undertaken to resolve a dispute as to the extent of a lien, this Court in applying the principle of full priority said:

> "Here as in Consolidated Rock Products Co. case the 'determination of what assets are subject to the payment of the respective claims' has a direct bearing on the fairness of the plan as between two groups of bondholders. The District Court should resolve the dispute."

The full priority principle applied in the Group of Institutional Investors case, supra, has been held by this Court in Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, to apply to proceedings under the Public Utility Holding Co. Act. The decision of the Circuit Court of Appeals probably is in conflict with that applicable decision of this Court.

(3) The Circuit Court of Appeals, while stating that the 1919 Bondholders should receive "the equitable equivalent of the rights surrendered" nevertheless found that "the due date fixed in the contract in this case cannot be urged * * * as the basis for a claim for interest payments," affirmed the position of the District Court and the Commission "that the mortgage clause providing for redemption is not applicable," and affirmed the District Court in finding that the fair equivalent of the claims of the 1919 Bondholders was 100. In applying the full priority principle, this Court said in Group of Institutional Investors v. Chicago, M., St. P. & P. Ry. Co., 318 U. S. 523: that Bondholders " 'must receive, in addition, compensation for the senior rights which they are to surrender' * * * the Commission and the District Court should determine what the General Mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old one, as equitable compen-

sation, qualitative or quantitative for the loss of their senior rights." The full priority principle applies to this proceeding under the Public Utility Holding Company Act. The decision of the Circuit Court of Appeals is probably in conflict with applicable decisions of this Court establishing the full priority doctrine.

(4) The Circuit Court of Appeals construed the standard of necessity provided in Section 11 (b) (2) of the Public Utility Holding Company Act (Aug. 26, 1935, c. 687, Title I, Sec. 11, 49 Stat. 820, 15 U. S. C. A. 79k) authorizing the Securities and Exchange Commission "to require * * * that each registered holding company and each subsidiary company thereof, shall take such **steps** as the Commission shall find **necessary** * * *" as not to apply "to the details of the plan" and held that that section did not require payment of redemption premiums on the 1919 bonds of Laclede Gas Company even though Laclede Gas continued as going operating utility and the Company had sufficient funds to pay such premiums and the plan required such funds to be deposited in escrow. This Court has not yet construed the application of the standard of necessity provided in Section 11 (b) (2) of the Act. The case involves a decision on an important question of federal law not decided by this Court.

(5) The Circuit Court of Appeals construed the exception clause of Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 (Aug. 26, 1935, c. 687, Title I, Sec. 11, 49 Stat. 820, 15 U. S. C. A. 79k) providing that "Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company * * *" to apply "only to security holders continu-

ing as such in the reorganized corporation" and not to security holders existing in the company up to the time of the consummation of the reorganization plan. This court has not yet construed the exception clause of Section 11 (b) (2) of the Act. The case involves a decision on an important question of federal law affecting thousands of investors not decided by this Court.

(6) The Circuit Court of Appeals construed Section 26 (c) of the Public Utility Holding Company Act of 1935 (Aug. 26, 1935, c. 687, Title I, Sec. 26, 49 Stat. 835) as making illegal the contractual provision for redemption premiums and concludes that, therefore, the 1919 Bondholders should be paid nothing above face value and accrued interest. This court has not yet construed the application of Section 26 (c) to a continuing operating utility. This involves a decision on an important question of federal law which has not but should be settled by this Court.

(7) The District Court did not independently determine whether the reorganization plan proposed was fair and equitable and appropriate to effectuate the provisions of Section 11 of the Public Utility Holding Company Act of 1935 (Aug. 26, 1935, c. 687, Title I, Sec. 11, 49 Stat. 820, 15 U. S. C. A. 79k) as required by Section 11 (e) of that Act but instead accepted the findings of the Commission on these questions as conclusive upon it and the District Court went so far as to say "Orders otherwise beyond the power of the Commission become valid when based upon appropriate findings by the Commission." The Circuit Court of Appeals did not reverse the District Court for failing to determine independently this question. This Court has not yet construed Section 11 (e) as to the requirement of independent determination of whether a plan is fair and equitable and appropriate to effectuate the provisions of the Act. This Court has not yet construed that

section as applied to an operating company. The case involves a decision of an important question of federal law not decided by this Court.

(8) The Circuit Court of Appeals did not reverse the District Court for finding that "The Commission's order of May 20, 1943 under Section 11 requiring Laclede Gas to recapitalize and substantially reduce its debt and requiring Ogden to divest itself of its interests in Laclede Gas and Laclede Electric, * * * is not reviewable by this court because under Section 24 (a) of the Act such order is reviewable only in a Circuit Court of Appeals, and only within sixty days of the entry thereof, which period has long since expired" and in finding that said order of May 20, 1943 is final on the issues here involved.

The Circuit Court of Appeals for the Third Circuit in Lownsbury et al. v. Securities & Exchange Commission, 151 F. 2d 217, held that divestment orders were interlocutory orders which were not reviewable under Section 24 (a) of the Act, but were only reviewable in an enforcement proceeding under Section 11 (e) and the same ruling is found as to a simplification order in Commonwealth & Southern Corp. v. Securities & Exchange Commission, 134 F. 2d 747. A conflict exists between the Circuit Court of Appeals for the Eighth Circuit on the one hand, the Sixth and the Third Circuits on the other hand, as well as the Second Circuit as pointed out in the Lownsbury case as agreeing with the Third Circuit.

CONCLUSION.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this court for its review and deter-

mination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the Court of Appeals for the Eighth Circuit be reversed by this Honorable Court and that your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. .....

MASSACHUSETTS MUTUAL LIFE INSURANCE CAMPANY,
Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION and THE LACLEDE GAS LIGHT COMPANY,
Respondents.

BRIEF

In Support of Petition for Writ of Certiorari.

OPINIONS OF THE COURTS BELOW.

The findings and opinion of the Securities and Exchange Commission (R. p. 8) are set forth in the Commission's Holding Company Act Release Nos. 5062 and 5071. The opinion of the United States District Court for the Eastern Division of Missouri (R. p. 98) is reported in 57 F. Supp. 997. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. p. 206) is reported in 151 F. (2d) 424.

JURISDICTION.

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit was entered October 30, 1945 (R. p. 220). The Petition for Rehearing was denied November 28, 1945 (R. p. 265). The jurisdiction of this Court is involved under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (28 USCA Sec. 347, 8 F. C. A. Title 28, Sec. 347), the provisions of which are made applicable by Section 25 of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 USC Sec. 79a et seq.).

STATEMENT OF THE CASE.

For the sake of brevity, we refer to the preceding petition, pages 8 to 17, for statement.

ARGUMENT.

I.

The Decision of the Circuit Court of Appeals for the Eighth Circuit Is Probably in Conflict With Applicable Decisions of This Court in Three Different Respects.

(1) Possible bankruptcy is not a factor to be considered in determining what is the fair and equitable equivalent of the rights of bondholders and the Circuit Court of Appeals in holding that possible bankruptcy is a factor to be considered is probably in conflict with the decisions of this Court in Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 123.

In Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 123, the Court held that foreclosure and liquidation under Sec. 77B could "have no relevant bearing on whether a proposed plan is 'fair and equitable'" and that "Submission to coercion is not the application of 'fair and equitable' standards."

In its "Findings and Opinion" in the instant case the Securities and Exchange Commission said (R. p. 45):

> "We are of the opinion that retirement of the 1919 bonds at principal amount plus accrued interest to the effective date of the plan constitutes fair and equitable treatment for the holders of those bonds. Laclede Gas, as we have heretofore observed, absent the plan, is in serious danger of defaulting on its first mortgage bonds less than a year hence. There is this serious danger that Laclede Gas would go into bankruptcy, were it not for the reorganization provisions of Section 11 of the Act. Aside from the practical hardship commonly suffered by senior security hold-

> ers during the course of an extended bankruptcy proceeding, the maturity of the 1919 bonds would doubtless be accelerated in the course of such a proceeding and thus their claim in the reorganization would be measured by the principal amount, exclusive of the redemption premium."

The Commission did not find that, absent reorganization, bankruptcy was inevitable; it stated that there were "possibilities of bankruptcy" (R. p. 35).

At the enforcement proceeding in the District Court, the petitioner herein, Massachusetts Mutual Life Insurance Company, both in its objections (R. p. 96) and its argument (R. p. 116) objected to the use of the results of possible bankruptcy as a standard of fairness and equitableness. The District Court quoted (R. p. 115) with approval the findings of the Commission and stated (R. p. 116):

> "If the protection of the value of the 1919 bonds were the sole problem before the Commission, perhaps the Commission could take the cold, detached position of objectors, but fortunately for others who have rights in the premise, such is not the case."

Before the Circuit Court of Appeals petitioner again objected to the use of what the bondholders would receive in bankruptcy as determinative of what they ought fairly and equitably to receive in a Section 11 proceeding. The Circuit Court of Appeals said (R. p. 215):

> "In applying the rule of equitable equivalence the Commission observed that owing to the excessive indebtedness of Laclede Gas and the imminent maturity of its first mortgage bonds there is serious danger of default on those bonds and of bankruptcy. These dangers and their consequences are averted only because of the reorganization provisions of Section 11 of the Act."

The Circuit Court of Appeals went on to say (R. p. 216):

> "Since there is a 'rational basis' in fact for the finding of the Commission and no 'clear-cut' error of law by either Commission or court, we are not inclined to disturb the conclusion that retirement of the bonds at principal and accrued interest amounts to the 'equitable equivalent of the rights surrendered.'"

It is thus clear that the Circuit Court of Appeals was of the opinion that what the Commission found that the 1919 bondholders would receive in bankruptcy, i. e., the principal and accrued interest, was the equitable equivalent of the rights surrendered by the 1919 bondholders and limited the amount to which they were entitled. It is submitted that this position is in conflict with the decision of this Court in Case v. Los Angeles Lumber Products Co., 308 U. S. 106.

In Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, this Court stated that the term "fair and equitable" as used in the Public Utility Holding Company Act of 1935 incorporates the principle of full priority and Case v. Los Angeles Lumber Products Co., supra, was cited as an application of the full priority doctrine. In Case v. Los Angeles Lumber Products Co., this Court held that whether or not bondholders would fare worse under bankruptcy could "have no relevant bearing on whether a proposed plan is 'fair and equitable.'" This Court said, 308 U. S. 106, 123:

> "The fact that bondholders might fare worse as a result of foreclosure and liquidation than they would by taking a debtor's plan under Sec. 77B **can have no relevant bearing on whether a proposed plan is 'fair and equitable'** under that section. **Submission to coercion is not the application of 'fair and equitable' standards. Such a proposition** would not only dras-

> tically impair the standards of 'fair and equitable' as used in Sec. 77B; it **would pervert the function of the Act.**" (Emphasis supplied.)

As in the Los Angeles Lumber Products Co. case, so here too, such a proposition "would pervert the function of the Act." The decision of the Circuit Court of Appeals in the instant case is in conflict with the decision of this Court in the Los Angeles Lumber Products Co. case, and that decision is applicable here.

(2) **The refusal of the District Court to resolve the dispute as to whether or not the lien of the 1919 bondholders of Laclede Gas Light Co. extended to the electric properties and the failure of the Circuit Court of Appeals to reverse the District Court because of such failure is in conflict with the decision of this Court in Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., 318 U. S. 523.**

In Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., 318 U. S. 523, this Court held that a District Court should resolve a dispute as to the extent of a lien in order to determine the fairness of a plan. This Court said at l. c. 568-569:

> "The General Mortgage bonds contend here, as they did before the Commission, that they have a first lien on those properties by reason of the after-acquired property clause in their mortgage. The Commission credited the 50-year bonds with the earnings from those properties, indicating however that the propriety of doing so was doubtful in absence of a judicial determination of the question. Some of the General Mortgage bonds objected to that allocation before the District Court. The District Court, however, did **not** undertake to resolve the dispute. These General Mortgage bondholders likewise raised

the point before the Circuit Court of Appeals. But it was not considered there * * *. **Here as in the Consolidated Rock Products Co. case the 'determination of what assets are subject to the payment of the respective claims' has a direct bearing on the fairness of the plan as between two groups of bondholders. The District Court should resolve the dispute.**" (Emphasis supplied.)

But let us consider the instant case. The Trustee of the 1919 bonds has at all times contended that the lien of the mortgage underlying these bonds extends to the property of Laclede Electric, including the improvements made thereon. (R. p. 32.) On the question of the lien the Securities and Exchange Commission said (R. p. 45):

> "Solution of Ogden's problems under Section 11(b) of the Act also necessitates retirement of the Laclede Gas 1919 bonds. Ogden has been ordered under Section 11 (b) to divest itself of its interests in Laclede Gas and Laclede Electric. However, as we have noted, so long as there is dispute between Laclede Electric and the Trustee under the 1919 bonds as to the extent of the lien, the securities of Laclede Electric or its properties are not in salable form. A purchaser thereof would simply be buying a law suit. * * * Thus, we believe that the retirement of the 1919 bonds, with its consequent elimination of the dispute as to the extent of the lien on the electric properties, is necessary to enable Ogden to divest itself of its interests in the two companies in a feasible manner."

The Commission did not determine the value of the lien. There was no determination of what the assets were subject to the payment of the respective claims. Instead, the Commission took the position that it would **eliminate** "the dispute as to the extent of the lien" by forcing retirement of the bonds and that Ogden, the holding company, would then be paid $6,175,000 for this

property, and Ogden in turn would exchange this sum, along with $905,000 cash and $2,000,000 collateral trust notes, for 2,000,000 shares of the new stock which Laclede Gas would issue. (R. p. 75.) In other words, there was no determination at all as to what assets were available to the bondholders. Instead, that part of the assets were given outright to junior security holders. The bondholders, of course, objected to this. (R. p. 95.) The District Court, however, said (R. p. 114):

> "That it (the Commission) has seen fit to order a procedure that will eliminate a lien claim on certain property and as a result of its act thereby remove a possible cause of loss to stockholders of the company owning that property, does not condemn its act in our opinion.
>
> * * * * * * *
>
> "But, the objectors assert, there is no ground for dispute as to the lien securing the 1919 Bonds covering certain property of Laclede Electric. Sufficient to answer that the Commission finds there is a dispute as to the lien coverage. Litigation was at one time started on the question. Certainly this Court cannot now try that collateral issue.
>
> " * * * We repeat that the holding of the Commission, that such a dispute (not the basis therefor) exists is not controverted and we are not in a position to try the merits of the respective claims of lien or no lien."

The District Court thus lightly dismissed as a "collateral issue" the very factor which this court has held to have "a direct bearing on the fairness of the plan". As in the Group of Institutional Investors case, so here too "The District Court should resolve the dispute".

The Circuit Court of Appeals did not consider this question, and did not discuss it at all, even though it was specifically raised by this petitioner (see particularly the

Petition for Rehearing, R. p. 221). The Circuit Court of Appeals, instead of considering this question, merely treated the electric properties apart from any dispute as to a lien. It said (R. p. 217): "If we assume that at the beginning of this proceeding both the common and the preferred stock, with its dividend arrears, of Laclede held by Ogden had little or no value, still for the 2,000,000 shares of new stock of the aggregate par value of $8,000,000 it surrenders to Laclede Gas cash and 6% collateral trust notes of the aggregate value of $9,000,000." The fact is that $6,175,000 of the $9,080,000 was the cash proceeds of the Laclede Electric properties which were sold and which the Commission alloted to Laclede Electric. It was these properties about which there was a dispute. Ogden had no clear title to them. The lien of the mortgage underlying the 1919 bonds came ahead of any rights of the stockholders of Laclede Electric. It was these properties about which there was the dispute. Ogden had no clear title to them. Totally ignoring this lien claim, the Circuit Court of Appeals sanctioned the giving to Ogden of $6,175,000 cash to which it was not entitled. Ogden then exchanged this cash, along with a surrender of its notes and $905,000 for $8,000,000 worth of new stock. In this manner Ogden is being highly compensated and preferred, all of which is in derogation of the rights of senior security holders and of the requirements of the absolute priority doctrine as enunciated by this Court in Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., supra, where it was held that the District Court should resolve a dispute as to the extent of a lien.

There is no doubt that the full priority doctrine and the holding that a District Court should resolve a dispute as to the extent of a lien is applicable to a proceeding under Section 11 of the Public Utility Holding Company Act of 1935; such as this proceeding is. This was settled by this Court in Otis & Co. v. Securities & Exchange Commission,

323 U. S. 624. It is submitted, therefore, that the decision of the Circuit Court of Appeals is also in conflict with the decision of this Court in Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., supra.

(3) **The full priority doctrine which has been established by this Court in numerous cases was further misconstrued and misapplied by the Circuit Court of Appeals in conflict with the decisions of this Court in that the Circuit Court of Appeals found that "the due date fixed in the contract in this case cannot be urged * * * as the basis for a claim for interest payments," and in that it affirmed the District Court in finding that the fair equivalent of the claims of the 1919 bondholders was 100.**

The full priority doctrine as developed by this Court gives substantive meaning to the words "fair and equitable" as used in Section 11 (b) (2) and 11 (e) of the Public Utility Holding Company Act of 1935. This meaning can be gathered from the following opinions by this Court.

In Case v. Los Angeles Lumber Co., 308 U. S. 106, this Court said at l. c. 115:

> "The words 'fair and equitable' as used in §77B (f) are words of art which prior to the advent of §77B had acquired a fixed meaning through judicial interpretations in the field of equity receivership reorganizations. Hence, as in case of other terms or phrases used in that section, Duparquet Huot & M. Co. v. Evans, 297 U. S. 216, 80 L. ed. 591, 56 S. Ct. 412, 30 Am. Bankr. Rep. (N. S.) 329, we adhere to the familiar rule that where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary. Keck v. United States, 172 U. S. 434, 446, 43 L. ed. 505, 510, 19 S. Ct. 254. In equity reorganization law the term 'fair and equitable' included, inter

alia, the rules of law enunciated by this Court in the familiar cases of Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. 392, 19 L. ed. 117; Louisville Trust Co. v. Louisville, N. A. & C. R., 174 U. S. 674, 43 L. ed. 1130, 19 S. Ct. 827; Northern P. R. Co. v. Boyd, 228 U. S. 482, 57 L. ed. 931, 33 S. Ct. 554; Kansas City Terminal R. Co. v. Central Union Trust Co., 271 U. S. 445, 70 L. ed. 1028, 46 S. Ct. 549. These cases dealt with the precedence to be accorded creditors over stockholders in reorganization plans. In Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 174 U. S. 674, 43 L. ed. 1130, 19 S. Ct. 827, supra, this Court reaffirmed the 'familiar rule' that 'the stockholder's interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors.' And it went on to say that 'any arrangement of the parties by which the subordinate rights and interests of stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation.' "

This doctrine of absolute priority that the rights of senior security holders are protected from invasion by junior security holders is well established. It is not enough that senior security holders receive an equivalent to the face amount of their claims, they must also receive compensation for the loss of their senior rights. Thus, it is said in Group of Institutional Investors v. Chicago, St. P. & P. Ry. Co., 318 U. S. 523, 569-571:

"Hence, as we indicated in the Consolidated Rock Products Co. Case, where junior interests participate in a plan and where the senior creditors are allotted only a face amount of inferior securities equal to the face amount of their claims, they **'must receive, in addition, compensation for the senior rights which they are to surrender.'** 312 U. S. 529, 85 L. ed. 995, 61 S. Ct. 675, 45 Am. Bankr. Rep. (N. S.) 79. And we stated that whether they should 'be made whole for the change in or loss of their seniority by an increased

participation in assets, in earnings or in control, or in any combination thereof, will be dependent on the facts and requirements of each case.' Id. 312 U. S., p. 529, 85 L. ed. 995, 61 S. Ct. 675, 45 Am. Bankr. Rep. (N. S.) 70. We felt that that result was made necessary by the ruling in the Boyd case that, 'If the value of the road justified the issuance of stock in exchange for old shares, the creditors were entitled to the benefit of that value, whether it was present or prospective, for dividends or only for purposes of control.' 228 U. S., p. 508, 57 L. ed. 943, 33 S. Ct. 554. We adhere to that view. Unless that principle is respected, there will be serious invasions of the rights of senior claimants to the benefit of the junior interests. The property of one group will be subtly appropriated to pay the claims of another while lip service is rendered the principles of priority."

* * * * * * *

"Our conclusion on the point is that, since junior interests are participating in the plan, **the Commission and the District Court should determine what the General Mortgage bonds should receive in addition to a face amount of inferior securities equal to the face amount of their old one, as equitable compensation, qualitative or quantitative for the loss of their senior rights.**" (Emphasis supplied.)

Nor is it enough that the relative priorities between the various security holders is maintained. Even though this is done, there still must be full compensatory provision "for the entire bundle of rights which the creditors surrender." In Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510, this Court said at l. c. 527-528:

"True, the relative priorities are maintained. But the bondholders have not been made whole. They have received an inferior grade of securities, inferior in the sense that the interest rate has been reduced, a contingent return has been substituted for a fixed one, the maturities have been in part extended and in

part eliminated by the substitution of preferred stock, and their former strategic position has been weakened. **Those lost rights are of value. Full compensatory provision must be made for the entire bundle of rights** which the creditors surrender." (Emphasis supplied.)

And at l. c. 528-529:

> "Thus it is plain that while creditors may be given inferior grades of securities, their 'superior rights' must be recognized. Clearly, those prior rights are not recognized, in cases where stockholders are participating, in the plan, if creditors are given only a face amount of inferior securities equal to the face amount of their claims. **They must receive, in addition, compensation for the senior rights which they are to surrender.** If they receive less than that full compensatory treatment, some of their property rights will be appropriated for the benefit of stockholders without compensation. That is not permissible. The plan then becomes within judicial denunciation because it does not recognize the creditors' 'equitable right to be preferred stockholders against the full value of all property belonging to the debtor corporation.' Kansas City Terminal R. Co. v. Central Union Trust Co., supra (271 U. S., p. 454, 70 L. ed. 1032, 46 S. Ct. 549)." (Emphasis supplied.)

It is essential to know the nature of the contractual rights of the 1919 Bondholders in order to determine whether they will, under the plan, receive full compensation for the senior rights which they are surrendering. It is also essential to know how the various classes of security holders are treated under the plan.

As of December 31, 1943, Laclede Gas had outstanding $17,500,000 of bonds of Series "C" (due February 1, 1953) and $5,500,000 of bonds of Series "D" (due February 1, 1960) of the First Mortgage Collateral and Refunding 5½% Gold Bonds (both of which have been referred to herein as the "1919 bonds") issued under the mortgage

executed by Laclede Gas on January 1, 1919 (R. p. 13). The mortgage securing the 1919 Bonds provides that such bonds "may be redeemed by the Company at any time at par and accrued interest and such premiums, if any, as the Board of Directors may determine at the time of the issuance of said bonds" (R. p. 42). There is no other provision for acceleration of maturity. The redemption premium on the Series C bonds due 1953 was 2% during 1944 and the premium on the Series D bonds is 4% during 1944, aggregating $570,000 (R. p. 42). If the bonds were not called prior to maturity, the bondholders would from January 1, 1944, to maturity receive in excess of $4,500,000 as interest on the bonds.

This right of interest to maturity date is a valuable senior security right. The petitioner is an insurance company which must determine its investment policies with great care in order to protect the interests of its numerous policyholders. In these bonds the appellant has a valuable investment which guarantees a return of 5½% until the maturity date of the bonds, except that the mortgagor may redeem the bonds prior to maturity upon the payment of specified redemption premiums. Absent a redemption provision in the contract, the bondholder has a right to refuse the payment of the principal at any time before maturity date and has a right to demand the payment of interest to the maturity date. Missouri, K. & T. Ry. Co. v. Union Trust Co. of New York, 156 N. Y. 592, 51 N. E. 309.

The District Court below did not consider at all the right of the bondholders to interest to maturity date. It considered conclusive upon it the Commission's determination that what the bondholders would receive in bankruptcy, that is, principal amount plus accrued interest, was the fair equivalent of the rights of the 1919 Bondholders (R. p. 134). The Circuit Court of Appeals found no error in this (R. p. 216). The Circuit Court of Appeals went further and said (R. p. 216):

"Appellant contends further that the plan is inequitable in that the Commission has not fairly subordinated the rights and interests of the stockholders and junior creditors to the superior rights of the bondholders. In support of this contention it is insisted that fair and equitable treatment under the plan as compared with the treatment of Ogden, owner of most of the Laclede Gas and Laclede Electric stock and a junior creditor of both corporations, would entitle the holders of the 1919 bonds to interest on their bonds until their maturity date or to reasonable compensation for reinvestment expenses.

"* * * The due date fixed in the contract in this case can not be urged, however, as the basis for a claim for interest payments. When the retirement of bonds is compelled by an Act of Congress in the furtherance of a legitimate public policy, contract provisions standing in the way of the consummation of that policy must yield to the public good and are illegal."

In addition to the fact that bondholders are not being compensated for the loss of their senior rights, the stockholders' interests are being greatly enhanced. In the words of the Commission (R. p. 38): "* * * The plan confers distinct benefits upon Ogden in converting its nonmarketable securities in the Laclede companies into marketable securities with substantial applicable earnings and immediate dividend prospects." The stock has been non-dividend paying for over 11 years and absent a plan would not pay dividends for many years to come (R. p. 17). Under the plan common stock will receive share for share a new common stock having reasonably prospective earnings of between 37¢ and 41.1¢ per share (R. p. 37). The preferred stock will receive 14 shares of the new common stock having between $5.18 and $5.75 of reasonably prospective earnings as compared with its annual $5.00 dividend preference, and the preferred stock as a class would have applicable to it between $120,849 and $134,241 as compared

with its total annual dividend preference of $116,650 (R. p. 37).

The Public Utility Holding Company Act of 1935 was enacted by Congress to control and police the activities of holding companies because Congress found that holding company operations, as they operated theretofore, were an evil inimical to the welfare of the country (Public Utility Holding Company Act of 1935, Sec. 1). The control of public utilities lie in the stockholders **not in the bondholders** who have no voice in the management of the utilities. It is through the control of stock that public utilities were able to exert their evil influences, which Congress sought to prevent. If there is any cost or price to pay for the policing or controlling of holding companies, it should be borne by the stockholders who are responsible for the management of the company, **and not by the bondholders who are not responsible for the management of the company.** In the instant case, however, it is the bondholders who are forced to sacrifice and to pay the costs of eliminating the holding company. At the same time the stockholders will receive "substantially superior" (R. p. 39) stock in lieu of their unmarketable stock and Ogden, the condemned holding company, receives "distinct benefits" (R. pp. 38-39).

As pointed out in the Consolidated Rock Products case, 312 U. S., l. c. 527-528, a reduction in interest makes an inferior security; the necessity of re-investing a 5½ per cent security on a 3½ per cent or lower market makes a much inferior investment.

This Court said in Group of Institutional Investors v. Chicago M. & St. P. & P. Ry., supra:

> "* * * they (senior creditors) 'must receive, in addition, compensation for the senior rights which they are to surrender' * * *. Unless that principle is respected, there will be serious invasions of the

rights of senior claimants to the benefit of junior interests. The property of one group will be subtly appropriated to pay the claims of another while lip service is rendered the principles of priority."

The very thing this Court warned against in that case has come to pass in the instant case.

The inequity and unfairness of the standard applied in the instant case is, oddly enough, graphically revealed in a ruling and opinion of the Securities and Exchange Commission after the decision of the Circuit Court of Appeals in the instant case (but before the Petition for Rehearing at which time it was called to the Court's attention [R. p. 253]).

That case was In the Matter of American Power & Light Company, which appears in Report No. 152 of C. C. H. Federal Securities Law Service, Par. 75,592, issued November 13, 1945. American Power & Light Co. (a holding company) was ordered to dissolve and liquidate. The company proposed a plan which called for payment of debentures at 100 and accrued interest. The Commission disapproved the plan and held that to be fair and equitable, 100 plus the call premium of 10 must be paid. The doctrine of earlier cases (specifically New York Trust Company v. Securities and Exchange Commission, 131 F. (2d) 274, and City National Bank & Trust Co. v. Securities and Exchange Commission, 134 F. (2d) 65, that 100 was fair and equitable whenever a holding company was ordered dissolved) was repudiated. The New York Trust Co. and the City National Bank & Trust Co. cases were decided on the basis that the "continued existence (of the Company) was made impossible" by order of the Commission and that the debenture agreements "contemplated as indispensable the continued existence of the corporation." It should be noted that the Commission under Section 11 of the Act has the power to order holding com-

panies to dissolve and go out of existence, but that because of the exception clause of Section 11 (b) (2) it has no such power as to operating companies such as Laclede Gas. Since the Commission could not, and does not in the instant case, order the dissolution of Laclede Gas the reasoning of the holding company cases, even if otherwise valid, would not apply to Laclede Gas.

In its opinion in the American Power & Light Company case, the Commission makes a confession and repudiates the position that it had theretofore taken. The Commission there says:

> "We believe that any statements in our early opinions and in our briefs to the courts in such cases which could lead to the conclusion that 100 is payable under any or all circumstances should not be followed because of the obviously inequitable results that such a rule would produce."

This statement leaves no doubt that the Commission had theretofore taken the position that 100 was payable under any and all circumstances and, as we will show, the instant case was one of those cases. The full import of this repudiation can be appreciated only when considered in light of the development of the case and the doctrine. In stating the facts and analyzing prior cases which inevitably led to this repudiation, the Commission clearly reveals that the facts in the instant case make the position of the Circuit Court of Appeals untenable. We are not implying that the Commission is a superior judicial body (indeed the petitioner has contended, and still does contend, that the District Court abandoned to the Commission its judicial function), but the District Court and the Circuit Court of Appeals both treated the Commission as a body of experts whose judgment must be respected without question on such matters. Since the "body of experts"

upon which the Circuit Court of Appeals placed implicit reliance has shifted its position the opinion of that Court is suspended in a void and is without foundation. The reasoning of the Courts being that of the Commission, and the Commission having discredited its own reasoning, ergo the Court's reasoning is likewise discredited.

Let us now examine the opinion of the Commission In the Matter of American Power & Light Company. In that case American Power & Light Company (American) filed an application pursuant to 11 (e) of the Act to obtain approval of a plan. The plan proposed to retire American's outstanding 6% Gold Debenture Bonds, due 2016, and Southwestern Power & Light Company's (Southwestern) 6% Gold Debenture Bonds, due 2022, assumed by American, at 100% of principal amount plus accrued interest. American is a holding company, and not an operating utility, which the Commission had ordered to liquidate and dissolve (Electric Bond & Share Company et al., Holding Company Act Release No. 3750). The debenture agreements provided that the debentures could be redeemed on any interest date, but only if the entire issue were redeemed at 110%. In that case there was no question as to the necessity of retiring the debentures, as there is in the instant case, for the reason that American had been ordered to dissolve and liquidate. This the Commission could so order because American is a holding company; the Commission, however, has no such power as to Laclede Gas, an operating utility. Consequently, the fundamental question before the Commission was that of the fairness of the plan.

At the outset the Commission was confronted with the well established principle that the absolute priority doctrine applied to an 11 (e) proceeding, that each security holder in the order of his priority must receive "from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered." What are

the rights surrendered? "The rights of the debenture holders are ascertained by reference to the contractual provisions in the indenture."

The Commission then observed that since American had been ordered to dissolve, the debentures were not entitled to receive the call premium as such. The call provision not being applicable, "The pertinent rights of the debentures which should be satisfied under Section 11 (e) must therefore be ascertained by reference to the remaining provisions of the contract. These rights include **the interest rate, the maturity date,** and all the other provisions of the contract." In other words, the Commission's position is that if the call provision is not applicable (except for establishing a maximum price), then the amount of interest the debt holder would receive to maturity is a right for which compensation must be paid. In the case of Laclede Gas the amount of such interest would be over $4,500,000.

The Commission well illustrates this position in answering the contention that in dissolution cases the payment of the face value prevailed in all cases. It said:

> "The application of a mechanical rule that all prepayments of debt in Section 11 (e) plans must be at the face amount of the debt claim would operate capriciously and might produce a windfall for one class of security holders at the expense of another. For example, if American's debentures, with their maturity 71 years distant, bore a contract interest rate of 8% whereas an interest rate of 4% would be the current rate for comparable obligations and would adequately measure the debenture holders' risk. **It would be highly detrimental to the value of the debenture holders' present rights if it were paid off at this time by retirement at 100.** By hypothesis, the debenture would be worth 100 if the interest rate were only 4%; the extra 4% interest makes the debenture worth

substantially more than 100 and payment at 100 deprives the debenture holders of the value of his right to receive the extra 4% for each of the 71 years until maturity. The stockholder, by the same token, would be relieved of his disadvantageous contract which would require him for 71 years to pay 4% extra interest each year than he would have to pay for funds currently raised by selling otherwise similar debentures. **Payment at principal amount would thus deprive the debenture holder of substantial value, and transfer such value to the stockholders giving them a windfall.**

"* * * **The principal determinant of values of such securities is the right to receive interest rather** than the amount of the principal claim. * * *

"It is clear, therefore, that if we follow American's contentions, the carrying out of Section 11 will result in substantial injustices to security holders. **Such a result is contrary to the Congressional intention manifest in Section 11.**" (Emphasis supplied.)

If that reasoning is applied to the facts of Laclede Gas it becomes clear that the plan does operate capriciously and does create a windfall for the stockholders at the expense of the 1919 bondholders. The 1919 bonds were 5½% bonds. Under the plan they would be redeemed at par. Then, Laclede Gas issued new bonds and debentures. The new bonds, in the amount of $19,000,000, sold at a coupon rate of 3½% with a small premium and the debentures sold at 3⅛%, making a saving to the stockholders (and a loss to the bondholders if they bought the new bonds and debentures) of over 2% per annum (10 Federal Register 3119). Thus a substantial injustice is done the 1919 bondholders. Neither the Commission, the District Court nor the Circuit Court of Appeals applied this standard (although it was presented to them by petitioner) to the instant case, and yet this standard must be applied if a "result contrary to the Congressional intention" is to be avoided.

As one would well know and as stated in its opinion, the position taken by the Commission in the American Power & Light Company case constituted a drastic deviation from its prior decisions. Consequently the Commission had great difficulty with those decisions, particularly in United Light & Power and North American Light & Power (which subsequently became New York Trust Co. v. S. E. C., 131 F. [2d] 274, and The City National Bank and Trust Company v. S. E. C., 134 F. [2d] 65). The difficulty was so great that the Commission was literally forced to repudiate the reasoning in those cases. The process of repudiation is interesting. First, the Commission states that those cases primarily held that the retirement of the bonds was compelled by Section 11 and was not therefore the kind of optional calling by the company which brought the redemption premium provisions into operation. As we have already pointed out this was because the companies, the indispensable factors, were being compelled to go out of existence, which is not the case of Laclede Gas. The Commission then made the observation that the debenture holders in those two cases made no attempt to relate to the Commission "such claimed compensation to the value of the debentures and to establish that the debenture holders' interest in the companies as continuing enterprises were worth more than the face amount of the claim." In the instant case, however, the 1919 bondholders have repeatedly made such an attempt. The Commission apparently realized the futility of such figmentary distinctions and said:

> "The Commission does not regard these two earlier cases under Section 11 (e) as representing a complete answer to all cases dealing with prepayment of debt under Section 11. As a result of the experience gained through consideration of a large number of later cases, we are persuaded that an automatic rule of 100 in all debt retirement cases would

produce inequitable results and that it is necessary to inquire into the circumstances of the particular case to determine whether the payment of 100 is fair and equitable. Consequently, in these later cases our opinions dealing with compulsory debt retirements under Section 11 have emphasized such circumstances, not articulated in the earlier cases, as the interest rate, maturity date, and risk factors incident to the particular security which is to be prepaid as bearing upon the fairness of the proposed discharge of the security."

It is patently observable from the record in the instant case that rights of the 1919 bondholders were dealt with in the archaic, rough-handed manner of the recanted concept, and not on the judicial basis of what is fair and equitable.

The Commission, however, was not permitted to dismiss the earlier cases that easily. It will be recalled that the courts on appeal based their reasoning on the doctrine of frustration. So in the American Power & Light Company case, it is said:

"American also relies heavily upon common law cases (also cited by us in our early two cases) involving frustration of contracts growing out of such diverse situations as termination of leases due to the passage of the Eighteenth Amendment, seizure by the government of a ship subject to charter, condemnation of a property by a municipality, etc. None of these cases involved a statute such as the Holding Company Act, which as we have previously pointed out, requires that, in a reorganization under Section 11, a security holder must receive the equitable equivalent of the rights surrendered by him and that such reorganization must not produce a windfall for one class of security holders at the expense of another. We do not believe these common law decisions arising in an entirely different context require us to

achieve inequitable results in Section 11 reorganizations."

While the Commission now denies in the American Power & Light case any potency to the frustration doctrine, it should be noted that the Commission relied on that very doctrine in the instant case. The District Court below likewise relied on the theory of frustration (R. p. 123).

The Commission having actually eviscerated the substance of its earlier two cases, then said:

> "We believe that any statements in our early opinions and in our briefs to the courts in such cases which could lead to the conclusion that 100 is payable under any or all circumstances should not be followed because of the obviously inequitable results that such a rule would produce."

The Circuit Court of Appeals in its opinion in this case holds that (R. p. 210):

> "The proper measure of such equivalence is for the determination of the Commission in the first instance, and its expert skill in appraising the facts to be considered must be accorded due weight by the court."

As to relying on the expert skill of the Commission, the Court went on to say (R. p. 210):

> "The due date fixed in the contract in this case can not be urged, however, as the basis for a claim for interest payments."

Now, the Commission (the Court's denominated experts) say:

> "The pertinent rights include **the interest rate, the maturity date**, and all the other provisions of the contract." (Emphasis supplied.)

If the interest to maturity is a pertinent right in determining the fairness of a plan in one case, its import cannot be avoided in another case by the mere ostrich fashion and manner of refusing to even consider this pertinent right. The Circuit Court of Appeals and the District Court below failed to independently examine the question of fairness. This is obvious from the manner in which necessary factors were not taken into consideration, and also from the fact that false and forbidden factors (such as alleged impending bankruptcy) were taken into consideration. Implicit faith was given to the Commission's determination of fairness. The American Power & Light Company case, as we have here pointed out, reveals that the Commission in the instant case applied a concept of fairness which is not fair and is now repudiated and discredited by its promulgators and which indeed leads to inequitable and unconscionable results, as it has here done. Now that the Commission has abandoned the false concepts, the District Court should examine the question of fairness and should, as the very minimum, not feel itself bound by "expert opinion," which its creators say is false and not to be used.

At the present time a great deal of uncertainty exists in the market of operating public utility bonds because of the vacillating interpretation given by the Commission of its powers under Section 11 (b) (2) of the Act. Formerly, operating utility bonds were considered a relatively safe and stable form of investment. Investors who were primarily concerned with stability, such as the petitioner, invested in such securities. Now, however, such investments are fraught with insecurity because the Commission has, in some instances (and the Courts below in the present instance), so construed the Act as to render the contract's obligation virtually meaningless. This insecurity can be eliminated only by a final decision of this Court which will settle the question of whether or not the Commission can

in some instances impair these obligations while in other instances it can enforce such obligations, which obligations were entered into prior to the Act of 1935 and are protected by Sec. 26 (c) thereof.

The decision of the Circuit Court of Appeals is totally inconsistent and irreconcilable on the facts with the standard of fairness and equitableness as established by this Court in the full priority doctrine.

II.

The Circuit Court of Appeals Has Decided Four Important Questions of Federal Law Arising Out of the Public Utility Holding Company Act of 1935 Which Have Not But Should Be Settled by This Court.

(1) The Circuit Court of Appeals construed the Standard of necessity provided in Section 11 (b) (2) of the Public Utility Holding Company Act authorizing the Securities and Exchange Commission "to require * * * that each registered holding company and each subsidiary company thereof, shall take such steps as the Commission shall find necessary * * *" as not to apply "to the details of the plan" and held that that section did not require payment of redemption premuims on the 1919 bonds of Laclede Gas even though Laclede Gas continued as an operating company with sufficient funds to pay such premiums and the plan required such funds to be deposited in escrow, pending court decision.

The Circuit Court of Appeals states that the standard of necessity in Section 11 (b) (2) "is not applicable to the details of the plan" but "provides only that the Commission must find the plan 'necessary' to effectuate a fair and equitable distribution of voting power among the security holders." This statement was made in connection with petitioner's contention that since Laclede

Gas had sufficient funds to pay the redemption premiums and had deposited such funds in escrow, it was not necessary to redeem the bonds without payment of premiums.

It needs no semanticist to be aware of the fact that Section 11 (b) (2) does not lend itself to the interpretation placed upon it by the Circuit Court of Appeals. Perhas it will be helpful to set out the applicable statutory language:

> "(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company."

It will be noticed that the word "necessary" appears twice in this subsection. The use of the word in the second instance is not significant here because it involves

a holding company ceasing to exist with respect to each of its subsidiary companies which themselves have a subsidiary company which is a holding company, a fact situation not here involved. The word is first used in that it is the duty of the Commission to require that "each registered holding company, and each subsidiary company thereof, shall take such **steps** as the Commission shall find **necessary** to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders of such holding-company system." This is hardly the place for an elementary review of the use of words, but that sentence certainly does not support the Court's conclusion that the subsection "provides **only** that the Commission must find the **plan** 'necessary' to effectuate a fair and equitable distribution of voting power." The subsection requires the Commission to find as necessary such **steps**. The word "steps" is not synonymous with the word "plan." The word "steps" is plural. It means all acts necessary to achieve the ends set out or to achieve the plan. That definitely involves a finding of necessity as to details. The Commission must **("shall" is used, which is mandatory)** find the **steps** necessary before it can order them to be done. If they are not necessary steps, then the Commission has no power to order them. Here the Commission had ordered the retirement of the 1919 bonds without payment of premiums. Therefore, such retirement without payment of premiums must be necessary to achieve the purposes of the subsection.

What the Circuit Court of Appeals has done is to transpose the word "necessary" and to endeavor to make it modify something that Congress did not say. Now, what are these necessary steps? They are not limited only to effectuate a fair and equitable distribution of the vot-

ing power. The steps must ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute the voting power among security holders. How is the step of retiring the 1919 bonds without payment of premiums necessary to achieve these purposes? It isn't, and it is obvious that, except for the payment of the sum now in escrow, no other feature of the plan, or in the corporate structure or in the voting power distribution, would be affected by the payment of the redemption premiums. The point here is that the standard of necessity does apply to the step of non-payment of premiums and that when applied it is plain that the retirement without payment of premiums is not necessary under the standards set forth in Sec. 11 (b) (2).

Moreover, the right to the redemption premiums (a sum in execess of a half a million dollars) is no mere detail to the 1919 Bondholders, the affected parties. The only point at which the bondholders can, in the first instance, receive a judicial determination of their rights is in an enforcement proceeding before the District Court. To have those rights sloughed off as inconsequential details renders meaningless any review granted. The implication of the Circuit Court of Appeals' position that the standard of necessity does not apply to details is that the Commission has no check whatsoever on it as to "details" so long as a plan is deemed necessary. Once it is decided that a plan is necessary, the Commission or the proponent of the plan could devise all sorts of details that would affect adversely and illegally the rights of others. Yet, under the ruling here such other persons could not question the details as unnecessary nor could they obtain judicial determination because the plan (and not the steps) had been held by the Commission to be necessary and the standard of necessity "is not applicable to the details of the plan."

Indeed the opinion of the Court of Appeals is a refutation of its conclusion. If the standard of necessity does not apply to details, neither the Commission, the District Court or the Court of Appeals need go into the question of the details or steps or discuss them. All that would be required under this theory would be a statement that the order of May 20, 1943 (even though not a final or appealable order, see Point III, infra) determined that a plan was necessary, ergo no necessity of discussing the "steps" or "details"; yet, the Commission, the District Court and the Circuit Court of Appeals found it necessary to go into details. Unless the statutory requirements are totally spurned, it is unavoidable that the "details" such as the retirement of the 1919 bonds must be considered and where rights are affected, as here, those rights must be judicially determined pursuant to applicable law.

As we have pointed out, the payment of the redemption premiums will in no way affect the other steps of the plan. The necessary funds are in escrow and except for this one step all other features of the plan have been put into effect. This step is not, therefore, necessary to effectuate any other provision of the plan. This is an important question of federal law affecting security holders of public utilities. It has not been settled by this Court, but it should be.

(2) **The Circuit Court of Appeals construed the exception clause of Section 11 (b) (2) of the Public Utility Holding Company Act to apply "only to security holders continuing as such in the reorganized corporation" and not to security holders existing in the Company up to the time of the consummation of the reorganization plan.**

The exception clause of Section 11 (b) (2) of the Public Utility Holding Company Act of 1935 provides as follows:

"Except for the purpose of fairly and equitably dis-

tributing voting power among the security holders, **nothing in this paragraph** shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public utility company."

Before the instant case, there was only one reported case dealing with Section 11 (b) (2) and an operating company. That case, In re Jacksonville Gas Co., 46 F. Supp. 852, involved a similar situation.

There a holding company, American Gas & Power Company, was being directed to divest its control of an operating company. The capital stock of the operating company had no equity in the company. The operating company was reorganized and new capital stock was distributed to the bond, debenture and note holders, and none to the stockholders. The Court there said, l. c. 856:

> "The present capital stock obviously has no equity in the company. Yet the holders of this stock now exercise the entire voting power—an obvious inequity within the meaning of Section 11 (b) (2) of the Act. **The voting power should be invested in the creditors who are now the real owners.**" (Emphasis supplied.)

And at l. c. 860:

> "* * * **The new stock is distributed amongst the present bond, debenture and note holders where it equitably belongs.** As American Gas & Power Company owns none of the present bonds, debentures or notes it will receive none of the new stock, and is thus deprived of its present control of Jacksonville Gas Company." (Emphasis supplied.)

The Jacksonville Gas Company case clearly states what is meant by "fairly and equitably distributing the voting power among the security holders." It means that the

voting power of such an operating company must be distributed to the then existing security holders in proportion to their equitable interests in the corporation. It does not mean that creditors can be eliminated contrary to their contracts and thereby deprived of this right. If the creditors are the real owners, then the voting power must be vested in them under the Act. The meaning of the exception clause found in Section 11 (b) (2) is perfectly clear. Now in the case of Laclede Gas there is one method whereby the stockholders can, legally and within the terms of the statute and the contracts, avoid the necessity of distributing the voting power to the bondholders, where it equitably belongs. The bonds provide for redemption upon the payment of redemption premiums. Consequently, the company can pay the premiums and redeem the bonds. If the bonds were so redeemed (and the bondholders could not object to such a contractual redemption) the voting power would not have to be distributed to the bondholders. But for the redemption provisions of the contracts, the voting power, under the clear language of the statute and the reasoning of the Jacksonville Gas Co. case, would have to be distributed to the real owners, the 1919 Bondholders.

The Circuit Court of Appeals in its opinion does not mention the Jacksonville Gas Company case, nor does it recognize at all the reasoning of that case. Instead, and by the use of jejune logomachy, it judicially legislates the exception clause of Section 11 (b) (2) so that the Circuit Court of Appeals has the section saying something that Congress did not say. While the Court of Appeals recognizes that "Laclede Gas is not a holding company and the bondholders are 'security holders of such company,'" it nevertheless contends that the voting power should not be distributed to the "security-holders of such company," but should be distributed to the **newly created**

security holders of the reorganized company at the expense of the then priority security holders. This Court says, "The term 'security holders,' as used in Sec. 11 (b) (2), can apply, therefore, only to security holders continuing as such in the reorganized company" (R. p. 218). In this manner the Court of Appeals has amended the exception clause of Section 11 (b) (2) to read as follows:

> "Except for the purpose of fairly and equitably distributing voting power among the **future** security holders **of the reorganized company (and not among the security holders existing at the time of the change of the corporate structure)**, nothing in the paragraph shall authorize the Commission to require any change in the corporate structure."

The emphasized portions of that sentence are what the Circuit Court of Appeals is actually adding to what Congress has said. Let us look at the effect of this judicially amended exception clause. The effect completely nullifies the meaning of the clause as it stood before amendment. The use of the word "The" before security holders has some meaning. The word "the" refers to particular object or objects, and is to be distinguished from the use of the word "a." Now before a plan is promulgated or effected, there are no security holders except those in existence, which in this case includes the 1919 bonds. It is these existing security holders that Congress had to mean for there are no other security holders the language used could apply to. To mean any other security holders the clause would have to be amended, and that is what the Court of Appeals endeavors to do. This judicially amended section gives the Commission an open field to tamper with the corporate structures of operating companies at will. Where Congress placed a definite restriction, the Commission can now make any sort of change in the corporate structure. It can eliminate classes of security holders

contrary to contractual rights and to the statute, but so long as other security holders who are not devastatingly demolished as security holders in the process receive the voting power, all will be well. It can not be forgotten that the **only** grounds upon which the Commission can require a change in the corporate structure of an operating company is for the **purpose** of fairly and equitably distributing the voting power among **the** security holders. "Purpose" means an object to be obtained, a result aimed at. Any change in the corporate structure must, to be justified, be a necessary step in obtaining the result aimed at, that is, the fair and equitable distribution of the voting power among the security holders. The Circuit Court of Appeals holds, however, that this is not so. Instead, the Commission can make any change in the corporate structure, and then after such change, it must distribute the voting power to the residual interests.

Under the reasoning of the Circuit Court of Appeals there is literally no change that the Commission could not effect in the corporate structure of an operating company. No restrictions remain. Under the power given the Commission by the Circuit Court of Appeals, the Commission has as much power to change the corporate structure of an operating company as Congress has given over holding companies.

This is an important federal question which affects the administration of the Public Utility Holding Company Act of 1935 and the interests of numerous security holders in operating public utilities. It has not been settled by this Court, but it should be.

(3) The Circuit Court of Appeals construes Section 26 (c) of the Public Utility Holding Company Act of 1935 as making illegal the contractual provision for redemption premiums and concudes that, therefore, the 1919 bondholders should be paid nothing above face value and accrued interest.

Before the Courts below the petitioner contended that the rights of the 1919 Bondholders should be determined by the interest they would receive to maturity except for the fact that they had entered into a contractual agreement whereby Laclede Gas could call the bonds before maturity upon payment of the redemption premiums, and that this contractual obligation was enforceable under Section 26 (c) of the Public Utility Holding Company Act of 1935. The Circuit Court of Appeals, however, took the position that "when the provisions of a contract are contrary to a new concept of public policy not foreseeable when the contract was made it becomes illegal and cannot be enforced" (R. p. 319), and, therefore, held that the 1919 Bondholders could not receive more than face value plus accrued interest.

It is submitted that this position totally fails to recognize the nature of Section 26 (c) and the contract here involved. In the first place the contract provision giving Laclede Gas the right to redeem the bonds before maturity is in derogation of the interests of the 1919 Bondholders. Without such a provision the 1919 Bondholders would be entitled to over $4,000,000 in interest to maturity. But, with such a provision the 1919 Bondholders, by their own contractual act, are limited to $570,000. If the redemption provision of the contract is illegal and non-enforceable, then it should not enter at all into the determination of what is fair and equitable treatment of these Bondholders. Instead of the $570,000 redemption premiums the fair and equitable treatment of the 1919 Bondholders should be

measured by the amount of interest they would receive to maturity, which is in excess of $4,500,000. In other words, fairness and equitableness should be measured by what the 1919 Bondholders would receive in interest to maturity. But, even though they ought to receive more than $570,000 that is the limit they can claim because they have contracted that the bonds might be redeemed upon paying premiums in that amount. That is the petitioner's position. Of course if the Circuit Court of Appeals is right, the 1919 Bondholders are not limited by their contract and they should receive complete compensation for the senior rights they are surrendering even though it exceeds $570,000. The 1919 Bondholders, however, have not tried to avoid their contractual obligations. They believe that the contracts which restrict and limit their rights is valid.

It is worth noting the position of the Commission in In the Matter of American Power & Light Company, CCH Federal Securities Law Service, Par. 75,592, which was decided after the Circuit Court of Appeals filed its opinion (but before the Petition for Rehearing, at which time it was called to the Court's attention, R. p. 253). In that case the Commission took the position that the call provision was not applicable except for the purpose of establishing a maximum price. The Commission went on and said: "The pertinent rights of the debentures which should be satisfied under Section 11 (e) must therefore be ascertained by reference to the remaining provisions of the contract. These rights include the interest rate, the maturity date, and all other provisions of the contract." The interpretation given by the Commission there is precisely that of the petitioner here.

Because the petitioner believes that its contractual obligations are valid and that the act should not be perverted, it is now placed in the anomalous position of ar-

guing for the maintenance of a provision that limits its rights. The concept which the Circuit Court of Appeals promulgates is not the policy enunciated by Congress. Section 26 (c) states "**Nothing in this title** shall be construed (1) to affect the validity of any loan or extension of credit * * * made or of any lien created prior or subsequent to the enactment of this title." That language is clear and ambiguous. The word "nothing" is not a weak word. Webster's New International Dictionary defines it thus: "Not anything; no thing (in the widest sense of the word thing); nought." It will be noticed that nothing applies to the whole title, the whole Act. The announced public policy (the new concept) of Congress is that no thing (in the widest sense of the word thing) in the entire Act "shall be **construed** (1) to affect the validity of any loan." Now the use of the word "construed" is significant because it means "to put a construction upon; to explain the sense or intention of." Since the Commission and the Courts are given power under the Act to apply and enforce it, Congress is thus telling them that they shall construe the Act so that nothing in the entire Act shall affect the validity of any loan. This is the "new concept" in that it controls the whole Act. There is nothing in the enforcement of the redemption provision of the contract which produces results at variance with the legislative policy. On the other hand, the construction of the Circuit Court of Appeals that the contracts are "illegal and cannot be enforced" does produce results at variance with the legislative policy as expressed in Section 26 (c) of the Act. Section 26 (c) of the Act must have some meaning. It is not to be presumed that Congress indulged in enacting meaningless and useless verbiage. The language at the Section is clear and its meaning is plain. Yet, the interpretation and construction given Section 26 (c) by the Circuit Court of

Appeals renders the section meaningless, it is an attempt by that court to overrule the manifest policy of Congress.

Section 26 (c) of Act, by its terms, was intended to protect extensions of credit or loans made prior to the enactment of the Act. This express intent of Congress renders the rulings of the Commission, the District Court and the Court of Appeals particularly deleterious because the securities here were issued long prior to the enactment of the Act. It was precisely this type of security that Congress intended to protect and did so protect by Section 26 (c), yet the Commission and the Courts below refuse to apply this clear Congressional command.

This is not a case of impossibility of performance or of frustration, as is found in those instances involving bondholders of a holding company where the holding company is ordered out of existence. Even the doctrine of frustration has been discredited as to holding companies by the Commission in the matter of American Power & Light Company, CCH Fed. Securities Law Service, Par. 75,592, where the Commission, referring to the frustration cases (which the Commission had previously relied upon), said that such decisions do not "require us to achieve inequitable results in Section 11 reorganizations." In any event the doctrine of frustration is not applicable here because Laclede Gas is continuing as an operating company. It has ample funds to pay more than the redemption premiums, and has in fact, as required by the plan, deposited in escrow funds sufficient to pay the premiums pending judicial determination of the right of the bondholders to the premiums. This is not a case of impossibility of performance or frustration. Laclede Gas is a continuing operating company. It has ample funds to pay more than the redemption premiums, and has in fact deposited in escrow funds sufficient to pay the premiums.

This Court has not settled the question of the applica-

tion of Section 26 (c) to continuing operating companies, but it should because it is an important federal question which affects the administration of the Public Utility Holding Company Act of 1935 and the interests of numerous security holders in operating public utilities.

(4) **The District Court did not independently determine whether the reorganization plan proposed was fair and equitable and appropriate to effectuate the provisions of Section 11 of the Public Utility Holding Company Act of 1935 as required by Section 11 (e) of the Act. The Circuit Court of Appeals did not reverse the District Court for failing to determine independently this question.**

Section 11 (e) of the Public Utility Holding Company Act of 1935 provides that the Commission, after it approves a plan "at the request of the Company, may apply to a court, in accordance with the provisions of subsection (f) of Section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may (enforce the order) * * *."

The District Court failed to exercise the independent judgment required of it by Section 11 (e). Instead it completely accepted and felt itself bound by the conclusions of the Commission as to whether the plan was fair and equitable and appropriate to effectuate the provisions of Section 11.

Some examples of the Court's abdication of its duties to the Commission are as follows:

The Court found as a conclusion of law (Conclusion No. VII, R. p. 134):

> "Since the finding of the Commission that the payment of the 1919 Bonds, as provided in the plan, without premium, is the fair equivalent of the rights of the 1919 bondholders was supported by substantial evidence before the Commission, that finding is conclusive in this proceeding."

It also found as a conclusion of law (Conclusion No. VI, R. p. 134):

> "Since the finding of the Commission that the payment of the 1919 Bonds without premium will not be a voluntary redemption on the part of Laclede Gas was supported by substantial evidence before the Commission, that finding is conclusive in this proceeding."

In its opinion the Court stated (R. p. 113):

> "The Commission found the plan was 'entirely appropriate' to comply with its orders. There are matters peculiarly within the discretion and powers of the Commission, and if based on evidence, we deem this Court bound by the finding."

Perhaps the extent of the reverence the Court had for the Commission is best illustrated in that portion of its opinion where the Court took the position that the Commission could exceed its powers as long as it made appropriate findings. The Court said (R. p. 121):

> "Orders otherwise beyond the powers of the Commission become valid, when based upon appropriate finding by the Commission."

Section 11 (e) of the Act requires the Court to find that a plan submitted by a company pursuant to that section is fair and equitable and appropriate to effectuate the provisions of the section before the Court can issue an enforcement order. This sub-section is unlike Section 11 (d), which provides for automatic enforcement of plans initiated by the Commission, i. e., it does not require the

Court to determine whether the plan is fair and equitable. Now, the fact that Congress saw fit to require such a determination by the Court in Section 11 (e) and did not require such a determination in Section 11 (d) shows that Congress intended the Court to determine independently the fairness and equitableness and the appropriateness of the plan, and not to blandly accept the Commission's statements as binding. The Commission recognized this necessity when in its Supplements Findings and Order approving the Plan it said:

> "However, inasmuch as the plan is not to be carried out except in accordance with an order of an appropriate federal district court, our order will be in such terms that it will not be operative to authorize the Commission of the transactions therein provided until such court shall * * * enter an order enforcing the plan" (R. pp. 64-65).
>
> "That this order shall not be operative to authorize the consummation of transactions proposed in the plan as amended until an appropriate federal district court shall, upon application thereto, enter an order enforcing such plan" (R. p. 71).

This condition was carried forward in order of December 2, 1944, approving the plan as amended November 16, 1944 (R. p. 154).

In reviewing the acts of administrative agencies, the courts must determine whether, in interpreting or applying statutes, an administrative agency has applied the proper criteria, whether its judgment is erroneous as a matter of law and whether there is statutory authority for the act of the agency.

In connection with the enforcement procedure, the Report of the Committee on Administrative Procedure appointed by the Attorney General, Senate Document No. 8, 77th Cong. 1st Ses., said at l. c. 82:

> "Statutory review.—Statutes creating administra-

tive tribunals generally provide methods by which their determinations may be judicially reviewed. In this way a number of methods have been established: First is the case in which the administrative order is not self-operative and suit for enforcement must be brought by the agency. For example, prior to 1906, no sanction was provided for securing obedience to orders of the Interstate Commerce Commission other than a suit by the Commission to compel obedience. The same was true of the Federal Trade Commission Act until 1938 and is true today of the National Labor Relations Act. The statutes differ as to the weight to be attached to the administrative findings, the courts in which enforcement is to be sought and the process by which judicial aid is to be invoked. These matters will be discussed below. **The point here is that by this method, administrative orders become effectively binding only when judicially enforced and a prerequisite condition of judicial enforcement is the court's determination that the order was properly made within the scope of the agency's legal authority.**" (Emphasis supplied.)

The same document points out (at l. c. 87-88) that the determination of the meaning of words is a judicial function:

"Thus the Supreme Court has held that what is an 'unfair method of competition' under the Federal Trade Commission Act is ultimately a question for the courts. Again, whether an employer is engaged in a business so related to interstate commerce that he is subject to the National Labor Relations Act is a question for the courts, as are also the questions, for example, whether an employer's refusal to put his agreement in writing can be an unfair labor practice under the Act and whether the National Labor Relations Board may order the hiring of a person whom the prospective employer has refused to hire because of his union affiliation. **Whether the factors upon which the administrative decision was based are such as the agency is permitted to consider and whether the fac-**

tors which it rejected are attached to various factors are all questions which the courts can review as questions of law." (Emphasis supplied.)

In Consolidated Rock Products Co. v. Du Bois, 312 U. S. 510, this Court said at l. c. 520:

> "On this record no determination of the fairness of any plan of reorganization could be made. Absent the requisite valuation data, **the court was in no position to exercise the 'informed, independent judgment'** (National Surety Co. v. Coriell, 289 U. S. 426, 436, 77 L. ed. 1300, 1305, 53 S. Ct. 678, 88 A. L. R. 1231), **which appraisal of the fairness of a plan of reorganization entails.** Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 84 L. ed. 110, 60 S. Ct. 1, Am. Bankr. Rep. (NS) 110. And see First Nat. Bank v. Flershem, 290 U. S. 504, 525, 78 L. ed. 465, 478, 54 S. Ct. 298."

In Federal Trade Commission v. Gratz, 253 U. S. 421, the Federal Trade Commission, after hearing, held that respondents had engaged in "unfair methods of competition." The Federal Trade Commission Act provided that the Commission could apply to the designated Circuit Courts of Appeal for an order to enforce a cease and desist order issued by the Commission. The Act also provided that the findings of the Commission as to the facts, if supported by testimony, would be conclusive. In that case the Commission applied for an enforcement order. This Court held that it was for the Court to determine what was meant by "unfair method of competition," and said at l. c. 427:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include."

In the instant case the District Court felt itself bound by the Commission finding of the fair equivalent of the

rights of the 1919 bondholders (R. p. 134). The court cannot be bound by the Commission's determination of what is fair and equitable or what is appropriate to effectuate the provisions of the Act.

When Congress establishes statutory standards and provides judicial review, the court must see that those statutory standards are applied. The Supreme Court said in United States v. Carolina Carriers Corp., 315 U. S. 475, 489:

> "Congress has prescribed statutory standards pursuant to which * * * rights are to be determined. Neither the court nor the (Interstate Commerce) Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. **Congress has also provided for judicial review as an additional assurance that its policies be executed. That review certainly entails an inquiry as to whether the Commission has employed those statutory standards.** If that inquiry is bolted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress has made 'pre-requisite to the operation of its statutory command.' * * * Hence that requirement is not a mere formal one. Only when statutory standards have been applied can the question be reached as to whether the findings are supported by evidence." (Emphasis supplied.)

As to the District Court's statement that "Orders otherwise beyond the power of the Commission become valid, when based upon appropriate finding by the Commission,"

we find it extremely difficult to believe that the Court could really mean such a statement. Yet that statement reveals the frame of mind that permeated the Court's treatment of the questions before it. For that statement the Court cites Securities & Exchange Commission v. Chenery Corporation, 318 U. S. 80, as authority. Nothing in that case could conceivably justify such a broad statement. As a matter of fact the Court there said at l. c. 94-95:

> "But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, **an order may not stand if the agency has misconceived the law.** In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. 'The administrative process will best be vindicated by clarity in its exercise.' Phelps Dodge Corp. v. National Labor Relations Bd., 313 U. S. 177, 197, 85 L. Ed. 1271, 1284, 61 S. Ct. 845, 133 A. L. R. 1217. What was said in that case is equally applicable here: 'We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.' Ibid. Compare United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 488-490, 86 L. ed. 971, 982, 983, 62 S. Ct. 722. In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. **We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.**" (Emphasis supplied.)

The petitioner's objection against the failure of the District Court to exercise its independent judgment was dismissed by the Circuit Court of Appeals as being "without merit". As we showed earlier in this brief, the District Court and the Circuit Court of Appeals misconstrued and misapplied the standard of fairness as established by this Court in the full priority doctrine. Nor did these courts consider factors which the Commission now (in In the Matter of American Power & Light Company, CCH Federal Securities Law Service, Par. 75,592, discussed supra under Point I [3]) considers to be necessary if a result "contrary to the Congressional intention manifest in Section 11" is to be avoided. If Section 11 (e) is interpreted to mean that the District Court is not required to independently determine whether the plan is fair and equitable and appropriate to effectuate the provisions of Section 11, then that section has no meaning. This is an important federal question which affects the administration and enforcement of the Public Utility Holding Company Act of 1935 and the rights, particularly their right to judicial review, of numerous security holders in public utilities. This question has not been settled by this Court, but it should be.

III.

The Holding of the Circuit Court of Appeals That the Order of the Commission of May 20, 1943, Is Final Is In Conflict With Decisions by Circuit Courts of Appeal for the Second and Third Circuits.

On May 20, 1943, the Commission entered an Order (R. pp. 85-89) which in no way indicated that the 1919 bonds should be retired. The Order did direct Ogden to eliminate itself as a public utility holding company. As to Laclede Gas, the Order merely provided that it should "take such steps as may be necessary to recapitalize so as to distribute voting power fairly and equitably among

the security holders" and that the recapitalization of Laclede Gas should include a "substantial reduction of the debt, the elimination of preferred stock arrears, and the conversion of its outstanding preferred and common stock into a single class of stock".

The District Court, as a conclusion of law (Conclusion of Law IV, R. p. 133), found that the Order of May 20, 1943, "is not reviewable by this court because, under section 24 (a) of the Act, such order is reviewable only in a Circuit Court of Appeals, and only within sixty days of the entry thereof, which period has long since expired". In its opinion the District Court said (R. p. 110), "Let not the effect on this case of the finality of the findings and order in the consolidated case be overlooked * * * no appeal having been taken by them in the consolidated case and, time for appeal having expired, it is a matter of serious doubt whether they are now in a position to complain of findings and orders in the consolidated case, which are now in this case if made to carry out the provisions of the order made by the Commission in the consolidated case". The Circuit Court of Appeals did not reverse the District Court on this interpretation of the appealable nature and the ramifications of the Order of May 20, 1943. It accepted the District Court's position that the Order was not appealed from and is now final (R. p. 209).

If the order of May 20, 1943 were an appealable order as to the issues here involved, why did the Commission provide that the plan approved should not be effective until an enforcement order was entered by the District Court?

Nothing in the Order of May 20th, 1943, could possibly be construed as directing the retirement of the 1919 bonds. A substantial reduction of Laclede Gas' debt could have been effected in any number of ways without the retirement of the 1919 bonds. This, the Commission

(R. p. 44) and the trial court (R. p. 116) recognized. The Order of May 20, 1943, did not adversely affect, or affect at all for that matter, the rights or interests of the 1919 Bondholders. The Bondholders could not have conceivably guessed that Ogden or Laclede Gas would subsequently propose a retirement of the bonds without payment of premiums. Even if this proposal could have been clairvoyantly foreseen, there was nothing the Bondholders could have done. They were not, by the terms or by the necessary effect of the Order of May 20, 1943, adversely affected. It is, of course, well established law that unless a person is adversely affected by an administrative determination, he has no grounds upon which to challenge that determination. For this reason the appellants herein could not appeal from the Order of May 20, 1943. The rule is laid down in Sixth Circuit in Detroit Edison Co. v. Securities & Exchange Commission, 119 F. (2d) 730, 740, thus:

> "The petitioner has asked for a declaration of status under the provisions of the statute. This is incompatable with a challenge to its validity. The party who invokes the power to review and annul Acts of Congress must be able to show that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement. Until some order of the Commission adversely affects the petitioner a challenge to constitutional validity is premature. City of Allegan v. Consumers' Power Company, 6 Cir., 71 F. 2d 477; East Ohio Gas Company v. Federal Power Commission, 6 Cir., 115 Fed. 2d 385."

In Commonwealth & Southern Corp. v. Securities & Exchange Commission, 134 F. (2d) 747, the SEC had issued a simplification order. The Company sought to appeal from the order, and, among other grounds, contended that the order violated the Fifth Amendment. The Court held that the point was prematurely raised and that the proper

place to raise the issue was in an enforcement proceeding, where objections could be made in so far as the plan affected their rights. The Court said at l. c. 753:

> "It is suggested by Commonwealth that the order is also in violation of the Fifth Amendment with respect to its stockholders, since it directs an alteration in their rights without their consent and without their having been heard. But without granting its validity, we think that this point is premature. The order now under review, as we have pointed out, is primarily designed to enable Commonwealth to comply with the mandate of the law by obtaining the voluntary co-operation of its stockholders. If they do thus co-operate and adopt a plan which complies with the Commission's order, obviously no question of want of due process can arise. On the other hand, if a voluntary readjustment cannot be consummated **and it becomes necessary to make applications to a district court for the enforcement under sections 11 (d) or 11 (e) of a plan proposed by the Commission or the Company the stockholders will have an opportunity to assert in the district court any objections, including want of due process, which they may have to the plan presented in so far as it affects their rights.**" (Emphasis supplied.)

Even where rights of security holders, such as the 1919 Bondholders are affected by an order, such as the one of May 20, 1943, the only proper place to raise objections is in an enforcement proceeding before the District Court. It has been clearly established that, even where rights are affected, an appeal cannot be made by security holders pursuant to Section 24 (a) of the Act for the reason that such orders are not appealable or final orders. Lownsbury et al. v. Securities and Exchange Commission et al., 151 F. (2d) 217 CCH, Federal Securities Law Service, Paragraph 90,322 (CCA 3rd). The facts in the Lownsbury case were as follows:

The case arose on a motion by the Securities and Ex-

change Commission to dismiss the petition of certain stockholders of The Commonwealth & Southern Corporation for review of two orders of the Commission. The question presented to the Court was whether the Circuit Court of Appeals was the proper forum to test the Commission's orders pursuant to Section 24 (a) of the Act, as contended by the stockholders, or whether the District Court was the proper forum pursuant to an enforcement proceeding under Section 11 (e), as contended by the Commission. It was observed that the orders of the Commission were "expressly stated not to be deemed operative to authorize any of the transactions contemplated by the plan until a District Court has entered an order enforcing the plan".

The Circuit Court of Appeals for the Third Circuit held that such orders were not reviewable under Section 24 (a), but that they were reviewable only in an enforcement proceeding under Section 11 (e). It adopted the contention of the Commission that such orders were interlocutory orders.

Judge Briggs, in his concurring opinion in the Lownsbury case, pointed out that "There may be in fact no definite 'plan' in the Commission's mind when it makes orders of divestment". That certainly was the case when the Commission issued the order of May 20, 1943, because the Commission directed future steps to be taken to perfect a plan—meaning that there were alternative methods, as has been recited by the Commission and the District Court. Moreover the Commission states this is not the only method by which the divestiture could be accomplished (R. p. 44).

As pointed out in the Lownsbury case, supra, the Second Circuit ruled in the same way in Okin v. Securities and Exchange Commission, 145 F. (2d) 206, as the Third Circuit did in the Lownsbury case.

From the Lownsbury case and the other cases, it is

patent that petitioner could not appeal from the order of May 20, 1943. The only forum in which they could object was in the enforcement proceeding of the specific plan subsequently approved and made effective only after an enforcement order. Yet, the Court of Appeals and the District Court below hold that the petitioner cannot raise objections in an enforcement proceeding because the order of May 20, 1943, was unappealed from and became final—even though the question of non-payment of redemption premiums was not considered, nor could it be considered because the plan so proposing had not been submitted to the Commission. The holding is in direct conflict with holdings in both the Second, Third and Sixth Circuits.

CONCLUSION.

For the reasons stated, a writ of certiorari should be issued out of this Court to review the judgment entered herein by the Circuit Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 802

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION AND LACLEDE GAS LIGHT COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 206–219), affirming the order of the United States District Court for the Eastern District of Missouri, is reported at 151 F. 2d 424. The opinion of the District Court (R. 98–135), approving and enforcing a plan previously approved by the Securities and Exchange Commission under Section 11 (e) of the Public Utility Holding Company Act of 1935, is reported at 57 F. Supp. 997. The

findings and opinion of the Commission (R. 8–58), dated May 24, 1944, have not yet been officially reported but are set forth in the Commission's Holding Company Act Release No. 5062.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Eighth Circuit was entered on October 30, 1945 (R. 220). A petition for rehearing was denied November 28, 1945 (R. 265). The petition for a writ of certiorari was filed on February 4, 1946. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. § 347), made applicable by Section 25 of the Public Utility Holding Company Act of 1935.

STATUTE INVOLVED

The applicable provisions of the Act are set forth in the Appendix, *infra*, pp. 30–41. The substance of the relevant statutory provisions is as follows:

Under Section 11 (b) (1) of the Act, it is the duty of the Commission to require all registered holding companies and their subsidiaries to "take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system * * *"

And under Section 11 (b) (2) of the Act, it is the duty of the Commission to require all regis-

tered holding companies and their subsidiaries to "take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system." The last sentence of Section 11 (b) (2) provides that "Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company."

To enable the Commission to compel compliance with its orders issued under Section 11 (b), the Commission is authorized by Section 11 (d) of the Act to resort to the district courts of the United States for enforcement of such orders, which may include reorganization.

Section 11 (e) permits a company, in anticipation of the compulsions of Section 11 (b) and (d), to "submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling" the company to comply with Section 11 (b). The Commission, after notice and op-

portunity for hearing, is authorized to consider whether the plan is "necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan," and, if the Commission so finds, to make an order approving the plan. Thereafter, the Commission is empowered, at the request of the company, to apply to a district court "to enforce and carry out the terms and provisions of such plan." The court is authorized to enforce the plan if, after notice and opportunity for hearing, it "shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11."

Section 26, upon which petitioner relies, is set forth in the Appendix, *infra*, pp. 40–41.

QUESTIONS PRESENTED

1. In connection with a debt retirement to comply with Section 11 (b) of the Holding Company Act, was it consistent with the "fair and equitable" standard of Section 11 (e) to pay face amount and interest to the effective date of the plan notwithstanding the existence of an indenture provision giving the company an option to retire the bonds at a premium?

2. Did the Commission and the courts below properly conclude under the circumstances of this case that compliance with Section 11 (b) required respondent Laclede Gas Company to retire its outstanding debt, including bonds held by petitioner?

Other questions stated by petitioner are either subsidiary to these basic questions or, in our opinion, are not really involved.

STATEMENT

The petitioners seek review by this Court of the judgment of the United States Circuit Court of Appeals for the Eighth Circuit which affirmed an order of the United States District Court for the Eastern District of Missouri approving and enforcing a plan previously approved by the Securities and Exchange Commission under Section 11 (e) of the Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79 (a) et seq.

The plan was proposed by Ogden Corporation, a registered holding company, and by certain of its subsidiaries including The Laclede Gas Light Company and Laclede Power & Light Company.[1] The plan, which has been fully executed, provided generally that Ogden was to divest itself of its interests in the two named subsidiaries, and that Laclede Gas was to be reorganized for the purpose of ending an unfair and inequitable distribution of voting power among its security holders.

In connection with the reorganization of Laclede Gas the plan provided for retirement of its out-

[1] The Public Utility Holding Company Act of 1935 is herein referred to as the "Act"; Ogden Corporation, as "Ogden"; The Laclede Gas Light Company, as "Laclede Gas"; and Laclede Power & Light Company, as "Laclede Electric."

standing bonds, including a second-mortgage issue known as the "1919 bonds" not then due, and for payment of face amount and interest to the effective date of the plan in full discharge of the company's obligation. Petitioner as a holder of bonds of this issue objected, claiming the right to a premium under an indenture provision permitting the issuer at its election to retire the bonds prior to maturity upon the payment of a stipulated premium. The Commission and the courts below rejected petitioner's contention concluding (1) that the retirement of the bonds under the plan did not constitute an exercise by the company of the privilege of retirement under the indenture provision relied upon by petitioners, and (2) that the standard of fairness and equity was fully satisfied by payment of face amount and interest under the circumstances. The prepayment was found necessary to comply with the Act and it was also found that the investment contract thus prematurely terminated by the operation of the Act did not have a value in excess of the face amount.

The plan has been fully consummated and the bonds discharged, except that a sum of money sufficient to pay the disputed premium has been held in escrow. The sole issue presented to the court below and involved in the instant petition is the right to the premium. However, in view of the nature of petitioner's arguments, including its challenge to the necessity and appropriateness

of the plan, it is necessary to describe the nature of the plan and the broader issues presented in the administrative proceeding.

Utilities Power and Light Corporation, predecessor of Ogden, was a public utility holding company, registered as such under Section 5 of the Act. It was in reorganization under Section 77B of the Bankruptcy Act, and its reorganization plan as confirmed by the court provided that the reorganized company, Ogden, would dispose of its public utility interests in order to meet the requirements of Section 11 (b) of the Act. (R. 14.) The reorganization plan of Utilities Power & Light also provided that the reorganized company would file a plan with the Commission designed to bring its utility system into conformity with Section 11 (b) of the Holding Company Act.

The reorganized company, Ogden, had two subsidiaries in St. Louis: Laclede Gas and Laclede Electric. Laclede Gas operates a mixed manufactured and natural gas business in the City of St. Louis. It also owned some electric utility assets which it leased to Laclede Electric. Ogden owned 23% of Laclede Gas's preferred stock and 85% of its common stock, giving it 74% of Laclede Gas's outstanding voting securities. Laclede Gas had outstanding a total of $34,000,000 of indebtedness, an amount in excess of the original cost of its properties, after adjustments to reflect adequate depreciation. Interest coverage was re-

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latively slight and earnings were less than interest charges in the years 1935, 1936, 1938, and 1939. Laclede Gas also had outstanding $2,333,000 par value of preferred stock, dividends on which had been in arrears for many years. (R. 12–17.) The 1919 bonds held by petitioner were second mortgage bonds outstanding in the amount of $23,000,000 and junior to a $9,000,000 issue of first mortgage bonds maturing on April 1, 1945. Because of obstacles to refunding the maturing first mortgage bonds and lack of funds to discharge them,[2] Laclede Gas might have been confronted with the necessity of reorganization under Chapter X of the Bankruptcy Act if it had not proved possible to work out a reorganization under the Holding Company Act (R. 41, 45–46, 215).

Laclede Electric was virtually a wholly-owned subsidiary of Ogden. It operated an electric utility system in St. Louis, in part with facilities leased from Laclede Gas. There was an unresolved controversy as to which electric properties were owned by Laclede Gas and which by Laclede Electric and as to whether the lien of the 1919 bonds of Laclede Gas extended to the properties owned by Laclede Electric, as well as to the concededly covered properties owned in fee by Laclede Gas and leased by it to Laclede Electric (R. 13). While Laclede Electric, unlike La-

[2] For a description of the precarious financial condition of Laclede Gas, see R. 15–20.

clede Gas, was not in imminent financial difficulty, nevertheless because of the unresolved controversy as to the scope of the lien, it would have been extremely difficult for Laclede Electric to raise any new capital from the public, an obvious necessity if it was to be in a position to hold its own competitively or even to meet the minimum demands for service on the part of the public (R. 55). The entire electric utility system operated by Laclede Electric competed in the City of St. Louis with the much larger Union Electric Company of Missouri. There were indications in the record of the wastefulness of this competition (R. 55).

Prior to the filing of the instant plan the Commission had entered an order in a consolidated proceeding under Sections 11 (e) and 11 (b) providing, in pertinent part, as follows: (a) Laclede Gas was directed, pursuant to Section 11 (b) (2), to "* * * take such steps as may be necessary to recapitalize so as to distribute voting power fairly and equitably" among its security holders; (b) Ogden was directed, pursuant to Section 11 (b), to "* * * take such action as may be necessary to divest itself of all of its interest * * * in * * * public utility companies" (including Laclede Gas and Laclede Electric) provided that in the case of Laclede Gas such divestment should not be effected by means of disposition of securities prior to its recapitalization "* * * to the extent necessary

to comply with Section 11 (b) (2)"; (c) the Commission expressed approval under Section 11 (e) of an over-all plan filed by Ogden and its subsidiaries which provided, among other matters, that Laclede Gas was to be recapitalized, as stated in the order, "* * * in such manner as to comply with the provisions of Section 11 (b) (2) of the Act; the recapitalization * * * to include a substantial reduction of its debt * * *."

In its findings and opinion accompanying that order, the Commission specifically found that bringing about an equitable distribution of voting power in Laclede Gas required a substantial reduction in its debt.[3] No petition was filed to review that order, and it is no longer subject to review.[4]

The instant plan was submitted for the stated purpose of complying with Section 11 (b) and the order of May 20, 1943. In its final form the plan provided in substance as follows (R. 21–23):

(1) The electric properties operated by Laclede Electric, including properties leased from

[3] The Commission stated: "In [the] reorganization [of Laclede Gas] it appears necessary that debt be reduced substantially, preferred stock arrears eliminated, and the property accounts adjusted to modern accounting and regulatory standards." (Holding Company Act Release No. 4307, p. 25.)

[4] Under the last sentence of Section 11 (b), all orders of the Commission under that subsection are subject to review in a circuit court of appeals under Section 24 (a) (*infra*, pp. 38–40). The sixty-day period within which such review might be sought has long since expired.

Laclede Gas, were to be sold to Union Electric Company of Missouri, a nonaffiliated company, at a base price of $8,600,000, and $2,200,000 of this amount was to be allocated to Laclede Gas as its share of the proceeds.

(2) Laclede Electric was to be dissolved.[5]

(3) Laclede Gas was to be recapitalized as follows: All of its publicly held bonds were to be retired at the principal amount thereof, together with accrued interest to the effective date of the plan. Laclede Gas was to sell at competitive bidding $19,000,000 of bonds under a new mortgage indenture, and $3,000,000 of serial debentures.[6] New common stock was to be issued to the preferred and common stockholders of Laclede Gas in certain stated proportions. In addition to 149,261 shares of new common stock to be allotted to it as a stockholder, Ogden was to receive 2,000,000 shares in return for (a) cancellation of $2,000,000 in notes held by it; (b) payment to Laclede Gas of $905,000 in cash; and (c) payment to Laclede Gas of Laclede Electric's share of the cash proceeds from the sale of the electric properties, this being approximately $6,175,000. (R. 104–105.)

[5] This dissolution required appropriate provision for minority stockholders.

[6] The new bonds have been sold at an interest rate of approximately 3½%, as compared with 5% on the 1904 bonds and 5½% on the 1919 bonds. The new debentures have been sold at an interest rate of 3⅛%.

(4) All of the new common stock of Laclede Gas acquired by Ogden was to be sold to the public.[7]

The net result of the plan was therefore full compliance with Section 11 (b): Ogden was to divest itself of its St. Louis utility properties, and Laclede Gas, with a $12,000,000 debt reduction and a correspondingly greater equity cushion, would have a more fair and equitable distribution of voting power among its security holders.

The Commission's holding that the plan was necessary and that it was necessary to retire the Laclede Gas 1919 bonds rested upon subsidiary findings as to (1) the necessity to reorganize Laclede Gas in order to correct inequitable distribution of voting power among its security holders, and (2) the necessity to simplify the complex nature of Ogden's interest in the St. Louis area in order to facilitate disposition thereof for the purpose of enabling Ogden to comply with Section 11 (b) (R. 43–45). The same

[7] Upon such sale Ogden received $4.44 per share of new Laclede Gas stock. The total amount received was $9,463,000. Inasmuch as Ogden contributed to the Laclede Gas reorganization $7,080,000 of cash (including the $6,175,000 received in connection with the sale of the electric properties), the balance of $2,383,000 represents what Ogden received for its entire interest in Laclede Gas consisting of $2,000,000 in notes and its stock holdings stated above (p. 7). We discuss below, at p. 20, n. 13, petitioner's intimation that Ogden should not have been regarded as entitled to the cash which it received from the sale of the electric properties.

factual findings are the basis for the Commission's conclusion that the company's submission of the plan for purposes of complying with the Act and with the prior order of the Commission did not constitute an election on its part to invoke the contractual provision for retirement of the bonds at a premium.

With respect to the fairness of payment of face amount and interest to the holders of 1919 bonds, the Commission found this to be adequate compensation for their claims "in view of the relatively small margins by which the claims are covered, and the substantial risks involved." The Commission noted, among other things, the imminent threat of bankruptcy absent the plan, the low financial rating and poor market record of the bonds, their marginal earnings and asset coverage, and the fact that they were originally offered at a substantial discount (R. 45–46). The District Court adhered to the Commission's conclusion after a detailed and considered analysis of the problems presented (R. 98–135).[8]

In affirming the order of the District Court the Circuit Court of Appeals noted the absence of any challenge to the findings of fact made by the Commission and approved by the District Court (R. 211), and its agreement with the inferences of the Commission and the District Court as to

[8] We believe that petitioner's suggestions of blind reliance upon the Commission (Pet. 67–74) are unwarranted.

the non-exercise by the company of the call provision in the indenture and the necessity for retirement of the 1919 bonds to comply with the statute.

ARGUMENT

While the principal problem presented by the petition is a recurrent one in the administration of the Act, the decision of the court below is clearly correct, is in conformity with the decisions of three other circuits, and does not call for further review by this Court. Petitioner's attempt to distinguish the earlier holdings rests upon inferences of fact rejected by the Commission and both of the lower courts, and its contention as to conflict with decisions of this Court rests, we submit, upon misapprehension of the problems presented.

1. The Commission and such courts as have considered the problem have uniformly held that indenture provisions for payment of a premium upon redemption at the election of the issuer are inapplicable where, as here, the retirement of the indebtedness occurs because of the compulsion of Section 11, whether to meet a Section 11 (b) order or in anticipation thereof. See R. 42, at n. 32. Cases in other circuits are: *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 274 (C. C. A. 2, 1942), certiorari denied, 318 U. S. 786, rehearing denied, 319 U. S. 781; *In re Standard Gas and Electric Company*, 151 F. 2d 326

(C. C. A. 3, 1945), petition for certiorari pending, Nos. 831, 832, 833, this Term;[9] *City National Bank and Trust Co.* v. *Securities and Exchange Commission,* 134 F. 2d 65 (C. C. A. 7, 1943). See also district court decisions cited in the *Standard Gas* case, 151 F. 2d 326, 332. The rationale of these decisions involves the following propositions:

(1) The common call provision in an indenture, such as that involved in the instant case, gives the corporation a privilege of prepayment on payment of a premium if it so elects and in itself adds nothing to the contractual rights otherwise conferred on the bondholders.

(2) Assuming that retirement of the debt before maturity is necessary to comply with the provisions of Section 11, a so-called voluntary plan filed under section 11 (e), including a provision for prepayment at face amount, does not involve an election by the company to exercise the call privilege.

(3) Assuming the call provision to be inapplicable, the situation is as if there were no provision for prepayment and the contract for continued use of funds by the company and payment of interest therefor were frustrated by operation of law.

[9] In the *Standard Gas* case the Third Circuit Court of Appeals cited the opinion of the district court in this case to support its holding on this point, expressing the view that that decision and the others cited are "right."

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(4) Prepayment of the bonds at face amount (with interest to the date of payment) is fair and equitable under circumstances which constitute it the substantial equivalent of the contract for payment of principal and interest to maturity.

In the *New York Trust Company* case, which was the first administrative as well as the first judicial precedent, there was no express reliance on the poor investment quality of the bonds to be retired as a circumstance affecting the conclusion that face amount and interest should be the measure of payment once it was determined that the premium provision was inapplicable.[10] In subsequent cases which have upheld premature payment of bonds at their face amount without premium under Section 11 (e) plans, both the Commission and the courts have relied, at least in part, upon the poor investment quality of the bonds involved and upon the absence of any showing that the application of this measure would result in an unfair windfall to stockholders by permitting them to escape through operation of the statute from a disadvantageous contract on payment of less than its investment value. The *American Power and Light Company* case, emphasized by petitioner, discusses the development of the doctrine. See Holding Company Act Re-

[10] The Commission's brief before the Court of Appeals did place some emphasis upon the low investment quality of the bonds involved in that case.

lease No. 6176 at pp. 11–14. In that case the Commission was confronted for the first time with a situation in which the bonds to be retired under the compulsion of Section 11 were found to have such high investment quality in relation to their interest rate as to make it appear that retirement at face amount would result in loss to bondholders and a windfall to stockholders. Under those circumstances the Commission concluded (one Commissioner dissenting) that the "fair and equitable" standard required a payment in excess of face amount. Even in that case, however, the call premium was treated as relevant only as fixing a maximum to the compensation otherwise payable to the bondholders.[11] But the problem which divided the Commission in the *American Power and Light Company* case is not presented by the facts of the instant case. On the contrary, it was the unanimous finding of the Commission and the courts below that the payment of face amount and interest was full compensation to the 1919 bondholders for the termination of the investment contract involved.

These same factual findings are a complete answer to petitioner's argument that the approval of the instant plan violates the principles laid

[11] One of the American Power & Light Co. issues to be retired was not presently callable and received a larger payment than the call price made applicable as a ceiling to the callable issue. See Holding Company Act Releases Nos. 6201, 6258.

down in *Case* v. *Los Angeles Lumber Products Company,* 308 U. S. 106, and other decisions of this Court. The established principle that bondholders must be compensated for accepting an inferior security surely does not mean that bondholders paid in cash must receive something more than the fair value of the rights surrendered. As the court below held (R. 215), the Commission in the instant case applied the rule of strict priorities, as stated by this Court in *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.,* 318 U. S. 523 (cited in *Otis & Co.* v. *Securities and Exchange Commission,* 323 U. S. 624, 639–640, as applicable to Section 11 (e)) under which "fair and equitable" treatment requires that a security holder should receive "in the order of his priority * * * from that which is available for the satisfaction of his claim the equitable equivalent of the rights surrendered." [12]

[12] Petitioner claims that the principle of the *Los Angeles Lumber Products Company* case was violated when the Commission referred to the possible bankruptcy of Laclede Gas absent the plan. But the ruling of this Court in that case was only that an unfair plan which violated the principles of strict priority could not be justified by the consideration that creditors affected might have fared worse in bankruptcy. Here the reference to possible bankruptcy (including a Chapter X proceeding in which application of the bankruptcy standard of fairness and equity scarcely would preclude paying face amount and interest to the holders of the 1919 bonds) was only to refute the hypothesis that petitioners were being deprived of a contract right which, apart from the operation of Section 11, might have been assumed to have a value in excess of face amount.

2. Petitioner (Pet. 22, 34) makes the impractical contention that the Commission and the District Court could not approve a plan for discharge of bonds at their face amount without resolving the long pending dispute as to whether the lien of the 1919 bondholders extended to the electric property owned by Laclede Electric, in addition to the concededly covered properties owned by Laclede Gas and leased by it to Laclede Electric. Under Section 11 (b) the Commission has a duty to bring about compliance "as soon as practicable." It is apparent that final resolution of this controversy would have involved delays and expense disproportionate to its bearing, if any, upon the rights of the 1919 bondholders to anything more than payment of the face amount of their claims. Indeed it is unlikely that an attempt to resolve this controversy as a preliminary to the plan could have had any consequence other than delay and an increase of the risk of bankruptcy which it was among the purposes of the plan to avoid. The earnings figures relied upon by the Commission reflected rentals paid by Laclede Electric under a lease which did not expire until 1953, and it was after giving effect to these rentals that the Commission found interest requirements of Laclede Gas covered by a relatively slender margin. In fact, in the years 1935, 1936, 1938, and 1939 its earnings, including such rentals, were less than its interest charges (R. 26). Resolution favorable to the 1919 bondholders of the contro-

versy as to the scope of the lien would at most have had some bearing on the prospective earnings after 1953—on the hypothesis that a more favorable rental could then be obtained.[13]

3. The holding of the court below that the plan is not in contravention of Section 26 (c) of the Act is in accordance with the result necessarily reached in all of the other cases which have denied payment of a premium. The Commission construes Section 26 (c) as merely a qualification of the conditions under which contracts in violation of the Act would be invalidated under the preceding subsections (a) and (b) of 26, or under common law principles applicable to illegal contracts. See *Community Gas and Power Company,* Holding Company Act Release No. 4395 (1943), pp. 19 to 21.[14] But on no possible interpretation of 26 (c),

[13] Petitioner urges that the computations of the Commission and the courts below regarding the fairness of the plan to Ogden erroneously gave it credit for the contribution of $6,175,000 cash to the Laclede Gas reorganization which Ogden received for its interest in Laclede Electric. Petitioner suggests that Ogden was not entitled to this cash because of the disputed lien claim of the 1919 bonds upon electric properties operated by Laclede Electric other than those leased from Laclede Gas. But there was no dispute as to the ownership of the equity in these assets; and even if bankruptcy of Laclede Gas had been precipitated as a result of the failure to put through a plan under the Holding Company Act, Ogden and Laclede Electric would have been free to realize upon this equity upon making provision for paying off the 1919 bonds at their face amount.

[14] The fact that Section 26 in its entirety was taken from Section 29 of the Securities Exchange Act of 1934, 48 Stat. 881, 903, emphasizes its relation to the general problem of the

could it be held to require the payment of a premium in the face of a determination that the contractual provision therefor is inapplicable. See *City National Bank and Trust Company* v. *Securities and Exchange Commission, supra,* 134 F. 2d 65, at 67.

4. We do not understand petitioner to raise any serious question as to the warrant in the record for the finding of the Commission and the lower courts as to the necessity to retire the 1919 bonds in order to resolve the problems confronting the Laclede companies and Ogden under Section 11. These problems included reduction of the debt of Laclede Gas so that its structure would no longer cause an inequitable distribution of voting power, as well as divestment by Ogden of its entire interest in both Laclede Gas and Laclede Electric. We believe it is sufficient that the plan resolves these problems in a direct and practical way. Application of the "necessary" standard in Section 11 (e) does not require a finding that the particular plan presented is the only possible method of compliance with the statute. To hold otherwise would require the rejection of all plans wherever more than one method of compliance might appear possible. In this case, however, no practical alternative has been suggested by petitioner or by anyone else.

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consequences of illegality and the absence of any intention that Section 26 should be construed to negative the reorganization powers elsewhere conferred in the Holding Company Act.

Since no substantial question is presented as to the necessity for retiring the 1919 bonds, it is immaterial that the resources of the companies concerned may have been sufficient to include payment of a premium if found fair and equitable. Petitioner purports (Pet. 54) to see sweeping implications in the statement of the court below that the Commission need only find the plan as a whole, rather than all of its details, to be "necessary." In its context, however, the holding is only that once prepayment of the 1919 bonds has been found "necessary," the amount to be paid to the bondholders must then be determined by "fair and equitable" standard under a proper construction of the contract obligations involved. We have seen that fairness and equity do not require payment of a premium.[15]

It would seem equally obvious that an established necessity for reduction in outstanding debt will support the necessity for a plan to accomplish this end by any one of a number of alternative methods—in this case by payment in cash, in others by exchange for new securities.

[15] One difficulty with petitioner's theory is that it might require payment of a premium to holders of callable bonds, although face amount might be sufficient if the bonds were noncallable. But the call provision is a privilege reserved to the company at its election and it has always been assumed that noncallable bonds are more desirable from the point of view of the bondholders than bonds which are subject to call at the option of the issuer.

5. We are not clear just what theory is implicit in petitioner's criticism of the holding of the court below (Pet. 58–62) that a plan to resolve inequitable distribution of voting power among the security holders of Laclede Gas could include a provision for payment in cash to some of the security holders affected by the plan.

(a) The last sentence of Section 11 (b) (2) provides:

> Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

In re Jacksonville Gas Co., 46 F. Supp. 852 (S. D. Fla.),[16] relied on by petitioner, and a number of other Commission and court decisions have uniformly construed this language as permitting any "change in the corporate structure or existence of any operating company found necessary for the purpose of fairly and equitably distributing voting power." Petitioner apparently does not challenge these decisions but argues that because the

[16] To the same effect see *In re United Gas Corp.*, 58 F. Supp. 501 (D. Del.); *In re Puget Sound Power & Light Co.* (E. D. Mass., unreported) and *Okin* v. *Securities and Exchange Commission*, 145 F. 2d 913, 914 (C. C. A. 2).

reorganization plan approved in the *Jacksonville* case distributed new securities to existing bondholders in satisfaction of their bonds, such a plan is the only type which may be approved in the case of an operating company. We think it clear that the sentence in question was intended only as a limitation upon the purposes which may occasion a reorganization rather than as an attempt to impose a rigid mold upon the form which a required reorganization may take.

(b) Nor is there any basis apart from the last sentence of Section 11 (b) (2) for a requirement that in a reorganization under that section bondholders must be given securities and may not have their claims satisfied in cash. Indeed, in the *Standard Gas and Electric Company* case (Nos. 831, 832, 833, this Term) a pending petition for certiorari is grounded on the diametrically opposite contention that creditors in a Section 11 (b) (2) reorganization may have their claims satisfied in cash but never in securities. The Commission does not employ such monist views, but believes the statute permits a form of plan which is best adapted to a solution of the problems presented in each situation. A plan which eliminates a class of security holders whose retention would give them inappropriate voting power is not infrequently necessary.

6. Contrary to petitioner's contention (Pet. 67–74), the opinions of the courts below indicate a

careful consideration of all legal questions raised by petitioner and a proper understanding of the respective functions of agency and court in passing on reorganization problems. In view of this consideration, and since there were no disputed issues of fact (R. 127, 211), petitioner makes no showing of how a different conception of the scope of judicial review could have changed the results.

In any event, the District Court did not err in concluding that the substantial evidence rule was applicable to its review of the Commission's findings incident to the court's determination of whether to approve the plan as fair and equitable. A plan under Section 11 (e) which does not contemplate district court enforcement is subject to review under Section 24 (a) (*infra*, pp. 38–40) upon petition filed in a circuit court of appeals by party aggrieved.[17] Section 24 (a) expressly incorporates the substantial evidence rule and the requirement that absent reasonable grounds for failure to raise an objection before the Commis-

[17] This was the review provisions applicable to the Commission's approval of Section 11 (e) plans in such cases as *New York Trust Company* v. *Securities and Exchange Commission*, 131 F. 2d 274 (C. C. A. 2, 1942), certiorari denied, 318 U. S. 786, rehearing denied, 319 U. S. 781, and in *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80. *Otis & Company* v. *Securities and Exchange Commission*, 323 U. S. 624, involved proceedings on appeal from district court approval, in an enforcement proceeding, of a plan theretofore approved by the Commission.

sion it shall not be considered before a court. Where a plan is the subject of court enforcement under Section 11 (e) the statute does not articulate the scope of the judicial review involved, but provides merely that court enforcement depends upon whether "the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11." It should be noted, however, that whereas the Commission must find the plan "necessary," the court need approve it only as "appropriate."

Analogies to the respective functions of Interstate Commerce Commission and court under Section 77 of the Bankruptcy Act indicate that what is involved is the normal process of judicial review in which administrative findings will be accepted by the courts if supported by substantial evidence, and in which questions of policy in the application of public interest standards are peculiarly for the agency. *Reconstruction Finance Corp.* v. *Bankers Trust Company,* 318 U. S. 163, 170; *Ecker* v. *Western Pacific R. R. Corp.,* 318 U. S. 448, 468, 473, 474.

We submit that petitioner has had the benefit of the judicial review to which it is entitled; for a fair reading of the opinions below indicates no departure from settled principles of administrative law as set forth in the decisions of this Court.

7. The references in the opinions below to the order of the Commission dated May 20, 1943 are not, as petitioner contends (Pet. 74–79), in con-

flict with decisions of other circuits. The Commission's order of May 20, 1943, was in the respects here pertinent an order pursuant to Section 11 (b) of the Act prescribing action which the Commission required of Ogden and the Laclede companies. That order was treated as conclusive only in establishing that Ogden was required to divest itself of its interest in the Laclede companies and that Laclede Gas was required to reorganize so as to reduce its debt substantially. Neither of these conclusions was or could be seriously contested by petitioner. In treating the order as the point of departure in measuring the companies' obligation to comply with the statute, the Court merely recognized the fact that the order was unquestionably final as to those companies, and made it clear that in submitting a plan of compliance with the order they were proceeding under the compulsions of the statute and not exercising a voluntary call privilege.[18]

[18] The order under Section 11 (b) was in a consolidated proceeding, and another clause of the same order expressed approval of a plan of compliance by Ogden which may have been regarded as in the nature of a program rather than a definitive plan. For that reason we assume that this phase of the Commission's order may have been declaratory and interlocutory in character. That portion of the order which imposed affirmative requirements on Ogden and Laclede Gas was specific and in the form contemplated by Section 11 (b). (See Holding Company Act Release No. 4307.) Whether or not such an order under 11 (b) may be deemed interlocutory in character, it is expressly made reviewable under the last sentence of Section 11 (b) which provides: "Any order made under this subsection shall be subject to judicial review as provided in section 24."

A similar point was made in the *New York Trust Company* case as to the effect of an earlier order requiring dissolution of United Light & Power Company, the proponent of the plan involved in that case. The order "having become final has thereby become the fixed point from which to survey the right they now claim", 131 F. 2d 274, 275. See also *City National Bank* v. *Securities and Exchange Commission,* 134 F. 2d 65, 68.[19]

Lownsbury v. *Securities and Exchange Commission,* 151 F. 2d 217 (C. C. A. 3), certiorari denied, No. 601, this Term, and *Okin* v. *Securities and Exchange Commission,* 145 F. 2d 206 (C. C. A. 2), relied on by petitioner, deal with a wholly unrelated problem, not affecting the judicial review which has been had in this case. Those cases merely hold that where a Section 11 (e) plan is to become effec-

[19] Petitioner urges that it was not adversely affected by the order of May 20, 1943, since the substantial reduction of Laclede Gas' debt required by that order could have been effected without retirement of the 1919 bonds, or might have been effected by retirement of the bonds with a premium. It is not necessary to determine here whether bondholders have standing to challenge an order under section 11 (b) fixing the action required of a company to comply with the statute. Cf. *Okin* v. *Securities and Exchange Commission,* 325 U. S. 385, and *Todd* v. *Securities and Exchange Commission,* 137 F. 2d 475 (C. C. A. 6). If, however, hondholders can object to such an order, it is clear that the time to do so is in connection with the entry of the order. To hold otherwise would thwart the purpose of the statute to treat such an order as final in the absence of timely review. As we have pointed out, bondholders are not foreclosed by such an order in respect to matters not covered by it.

tive only after enforcement in a district court under Section 11 (e), the orderly process of judicial review must be limited to challenging the plan in the district court and, if the challenge is rejected, by appealing from the district court's order. The holding in those cases that such an administrative order is not subject to direct review under Section 24 (a) of the Act rests in part on the fact that the last sentence of Section 11 (b), expressly referring to review under Section 24 (a), is by its terms limited to subsection (b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 1946.

APPENDIX

Public Utility Holding Company Act of 1935, 49 Stat. 803, 15 U. S. C. 79a *et seq.*:

SECTION 1.

* * * * *

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H. J. Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is hereby declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon

the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an overcapitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective pub-

lic regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and widespread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is hereby declared to be the policy of this title, in accordance with which policy all the provisions of this title shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this title.

* * * * *

SEC. 11. (a) It shall be the duty of the Commission to examine the corporate structure of every registered holding company and subsidiary company thereof, the relationships among the companies in the holding-company system of every such company and the character of the interests thereof and the properties owned or controlled thereby to determine the extent to which the corporate structure of such holding-company system and the companies therein may be simplified, unnecessary complexities therein eliminated, voting power fairly and

equitably distributed among the holders of securities thereof, and the properties and business thereof confined to those necessary or appropriate to the operations of an integrated public-utility system.

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of

localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) To require by order, after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this

paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission may by order revoke or modify any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24.

* * * * *

(d) The Commission may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce compliance with any order issued under subsection (b). In any such proceeding, the court as a court of equity may, to such extent as it deems necessary for purposes of enforcement of such order, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction, in any such proceeding, to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer under the direction of the court the assets so possessed. In any proceeding for the enforcement of an order of the Commission issued under subsection (b), the trustee with the approval of the court shall have power to dispose of any or all of such assets and, subject to such terms and conditions as the court may prescribe, may make such disposition in accordance with a fair and

equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing. Such reorganization plan may be proposed in the first instance by the Commission, or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization.

(e) In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for

hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

(f) In any proceeding in a court of the United States, whether under this section or otherwise, in which a receiver or trustee is appointed for any registered holding company, or any subsidiary company thereof, the court may constitute and appoint the Commission as sole trustee or receiver, subject to the directions and orders of the court, whether or not a trustee or receiver shall theretofore have been appointed, and in any such proceeding the court shall not appoint any person other than the Commission as trustee or receiver without notifying the Commission and giving it an opportunity to be heard before making any such appointment. In no proceeding under this section or otherwise shall the Commission be appointed as trustee or receiver without its express consent. In any such proceeding a reorganization plan for a registered holding company or any subsidiary company thereof shall not become effective unless such plan shall have been approved by the Commission after

opportunity for hearing prior to its submission to the court. Notwithstanding any other provision of law, any such reorganization plan may be proposed in the first instance by the Commission or, subject to such rules and regulations as the Commission may deem necessary or appropriate in the public interest or for the protection of investors, by any person having a bona fide interest (as defined by the rules and regulations of the Commission) in the reorganization. The Commission may, by such rules and regulations or order as it may deem necessary or appropriate in the public interest or for the protection of investors or consumers, require that any or all fees, expenses, and remuneration, to whomsoever paid, in connection with any reorganization, dissolution, liquidation, bankruptcy, or receivership of a registered holding company or subsidiary company thereof, in any such proceeding, shall be subject to approval by the Commission.

* * * * *

SEC. 24. (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any

officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon

certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

* * * * *

SEC. 26. (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this title or of any rule, regulation, or order thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, regulation, or order.

(c) Nothing in this title shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this title, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making

such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this title or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this title or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
v.
SECURITIES AND EXCHANGE COMMISSION and THE LACLEDE GAS LIGHT COMPANY,
Respondents.
No. 882.

BRIEF OF RESPONDENT THE LACLEDE GAS LIGHT COMPANY IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION and THE LACLEDE GAS LIGHT COMPANY,
Respondents.

No. 802.

BRIEF OF RESPONDENT THE LACLEDE GAS LIGHT COMPANY IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the United States District Court for the Eastern Division of Missouri (R. p. 98) is reported in 57 Fed. Supp. 997. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. p. 206) is reported in 151 Fed. (2d) 424.

STATEMENT OF GROUND ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Petitioners assert that this Court has jurisdiction under Section 240 of the Judicial Code as amended by the Act of February 13, 1945 (28 U. S. C. A., Sec. 347, 8 F. C. A., Title 28, Sec. 347), the provisions of which are made applicable by Section 25 of the Public Utility Holding Company Act of 1935 [49 Stat. 803, 15 U. S. C. A., Sec. 79 (a) et seq.], hereinafter referred to as the Act.

STATEMENT OF THE CASE.

We believe that the issues of this case for the purpose of determination of the question herein involved may be very simply stated and, accordingly, we set forth said statement below.

The Laclede Gas Light Company (hereinafter in this brief called "Laclede Gas"), one of the respondents herein, is a Missouri corporation engaged in the gas utility business within the corporate limits of the City of St. Louis (R. p. 12). Laclede Power & Light Company (hereinafter called "Laclede Electric") is a Missouri corporation organized in 1926, engaged in the electric utility business in the City of St. Louis (R. p. 13). Ogden Corporation (hereinafter called "Ogden"), a registered holding company, is a Delaware corporation which, as of December 31, 1943, owned 73.51% of Laclede Gas' voting securities and 99% of Laclede Electric's voting securities (R. pp. 14-15).

The Plan (R. p. 21) which was finally consummated involved a number of steps which resulted in a reduction in the funded debt of Laclede Gas, changes in its capital structure, the sale of the assets of Laclede Electric to Union Electric Company of Missouri, and the sale by Ogden Corporation of its stock in Laclede Gas, so that the general public became the owner of the stock of Laclede Gas. Among the many provisions of the Plan which brought about the accomplishment of the foregoing, the Plan contained a provision to the effect that the First Mortgage Collateral & Refunding 5½% Gold Bonds (hereinafter called the "1919 Bonds") would be paid at the principal amount thereof, with interest accrued to date of payment, but without any redemption premium. Petitioner claims that it is entitled to the premium. This is the sole issue in the case.

The Securities and Exchange Commission (hereinafter

referred to as the "Commission"), in its Findings and Opinion (R. pp. 42-43), concluded that the retirement of the 1919 Bonds was attributable to the requirements of Section 11 (b) of the Act. The District Court found that this finding was supported by substantial evidence, and that the retirement of the bonds was involuntary (R. p. 132). In view of these findings, it naturally followed that the provisions of the mortgage securing the 1919 Bonds, which called for the payment of a redemption premium, were inapplicable. Since the provisions of the mortgage securing the 1919 Bonds which called for the payment of a redemption premium, were inapplicable, it followed that the provision of the Plan calling for the retirement of the 1919 Bonds at their principal amount without premium was fair and equitable and, accordingly, there was no reason for the Circuit Court of Appeals to disturb the above mentioned findings.

ARGUMENT.

We set out below a specific answer to each of the points made by Petitioner in its brief. However, we wish to point out that, in general, the grounds alleged to exist by Petitioner are inadequate to justify the granting of the writ by this Court. In the case of New York Trust Company v. Securities and Exchange Commission (2nd C. C. A. 1942), 131 Fed. (2d) 274, a plan provided for the dissolution of a registered holding company and payment of its outstanding debentures at the principal amount thereof without premium. Certiorari was applied for and denied by this Court (318 U. S. 786, 87 L. Ed. 1153). Since the plan in that case and the Plan in the case at bar were both enforced by virtue of Section 11 (b) of the Public Utility Holding Company Act, and since the issue in both cases was substantially the same, namely, whether or not a premium was payable, it is difficult to see why certiorari should be granted in the instant case when it was denied in the case of New York Trust Company v. Securities and Exchange Commission, supra.

I.

Petitioner under Part I of its Argument makes the statement (p. 31, Petitioner's Brief) that the decision of the Circuit Court of Appeals for the Eighth Circuit is probably in conflict with applicable decisions of this Court in three different respects. We set out below the three points made by petitioner and separately answer each point.

(1)

Petitioner first makes the following statement (p. 31, Petitioner's Brief): "Possible bankruptcy is not a factor

to be considered in determining what is the fair and equitable equivalent of the rights of bondholders and the Circuit Court of Appeals in holding that possible bankruptcy is a factor to be considered is probably in conflict with the decisions of this Court in Case v. Los Angeles Lumber Products Co., 308 U. S. 106, 123."

It is our position that the granting of a writ of certiorari requires the existence of a real conflict. We do not believe that some statement or finding of a lower court which is mere dicta or which is unnecessary to bring about the final result does in fact give rise to a real conflict. This is well illustrated in the point under discussion. Petitioner quoted one paragraph from the Findings and Opinion of the Commission in which statements were made by the Commission about the possible bankruptcy of Laclede Gas. Petitioner did not quote the following paragraph from said Findings and Opinion (R. p. 46) which reads as follows:

> "The 1919 bonds are speculative in caliber and are rated only C1+ by Standard and Poor's Corporation. The company received only 91.45% of principal amount on the sale of the Series C bonds and 95% on the sale of the Series D bonds, and both series have sold on the markets at prices substantially less than principal amount during most of the intervening years. In 1931 the Series C bonds sold as low as 62 and the Series D as low as 65; as recently as 1940, both series sold as low as 38. Payment of principal amount and accrued interest is adequate compensation for the claims of these bonds in view of the relatively small margins by which the claims are covered, and the substantial risks involved."

Accordingly, it is clear that the Commission took a number of factors into account to determine whether payment of the principal amount without premium was fair and equitable. The mere fact that it may have taken the

possible bankruptcy of Laclede Gas into account as one of those factors does not in our opinion warrant the conclusion of Petitioner that there is a conflict between the instant case and Case v. Los Angeles Lumber Products Co., supra. If it is a conflict, then it is our position that it is not the kind of a conflict which warrants the granting of a writ of certiorari. It would seem to us that the business of this Court would be endless if a writ were granted on this ground.

(2)

Petitioner for its second point makes the following statement (p. 34, Petitioner's Brief): "The refusal of the District Court to resolve the dispute as to whether or not the lien of the 1919 bondholders of Laclede Gas Light Co. extended to the electric properties and the failure of the Circuit Court of Appeals to reverse the District Court because of such failure is in conflict with the decision of this Court in Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., 318 U. S. 523."

There is no merit whatsoever in this point. Nobody has denied that Laclede Gas had sufficient cash to pay the premium without crippling its working capital position. Accordingly, the extent of the lien of the 1919 bonds is completely immaterial and irrelevant to the question of whether or not Laclede Gas should pay the premium on the 1919 bonds, and it follows that there can be no possible conflict with the case of Group of Institutional Investors v. Chicago, M. St. P. & P. Ry., 318 U. S. 523.

(3)

Petitioner for its third point makes the following statement (p. 38, Petitioner's Brief): "The full priority doctrine which has been established by this Court in numerous cases was further misconstrued and misapplied by

the Circuit Court of Appeals in conflict with the decisions of this Court, in that the Circuit Court of Appeals found that 'the due date fixed in the contract in this case cannot be urged * * * as the basis for a claim for interest payments,' and in that it affirmed the District Court in finding that the fair equivalent of the claims of the 1919 bondholders was 100."

Petitioner claims that the Plan was erroneously approved. The Commission found that the payment of the bonds at 100¢ on the dollar was the fair equivalent of the value of Petitioner's rights. Petitioner contends that this conflicts with the full priority decisions of this Court. We submit that there is no conflict whatsoever.

The case of Otis & Co. v. Securities and Exchange Commission, 323 U. S. 624, in effect holds that even the express provisions of a security may not necessarily be a standard of fairness and equity where a change occurs as a result of the impact of Section 11 (b). The Court said (l. c. 638):

> "Where pre-existing contract provisions exist which produce results at variance with a legislative policy which was not foreseeable at the time the contract was made, they cannot be permitted to operate. Compare New York Trust Co. v. Securities & Exch. Commission (CCA 2d), 131 F. (2d) 274; Re Laclede Gas Light Co. (E. Mo. D. C., Aug. 25, 1944)."

Under the decision of that case, the provision of a preferred stock certificate providing for a premium on liquidation, whether voluntary or involuntary, was held not to be applicable upon the dissolution of a company under Section 11 (b). It would seem to follow a fortiori that the provision for payment of a premium on the 1919 bonds would not be applicable in the instant case, since under the express provisions of the mortgage an **election** to redeem is necessary. (See statement of Court in the case of In re North Continent Utilities Corporation [D. C.

Del. 1944], 54 Fed. Supp. 527, at page 530.) Accordingly, insofar as the provision with respect to the payment of a premium is concerned, the lower court decisions are not only not in conflict with the decisions of this Court, but are definitely in accord therewith.

Certainly the holding by the Commission cannot be stated to be in conflict with the full priority doctrine. That doctrine merely holds that a senior security holder shall be fully compensated before any allowance shall be made to a junior security holder. The Commission has determined that Petitioner has received such full compensation (R. p. 46), and the lower courts have determined that there is no error in such determination.

It hardly seems necessary to add that the decision of the Commission in the American Power & Light Company case (C. C. H. Federal Securities Law Service, Par. 75,592) is completely irrelevant insofar as the petition for certiorari is concerned. We do not agree that that case is in fact a reversal of the Commission's prior holdings, but irrespective of whether it is a reversal or not, it is certainly not the function of this Court to grant certiorari because a commission has changed a ruling, particularly where the change is in line with what the petitioner for certiorari desires.

II.

Petitioner under Part II of its Argument makes the following statement (p. 54, Petitioner's brief): "The Circuit Court of Appeals has decided four important questions of Federal law arising out of the Public Utility Holding Company Act of 1935 which have not but should be settled by this Court."

Under this ground Petitioner mentions four different questions which are more fully discussed below. Before discussing each question separately, we desire to point out that the function of the writ is to give this Court a chance

to pass upon questions either of great public or great legal importance. The writ of necessity can only be granted in such cases, and cannot be granted to construe every Federal statute and all of the details thereof. If this Court were to attempt to determine all questions arising under the multitude of Federal statutes, it could never physically complete its business. It is our position that the questions termed by Petitioner to be of sufficient importance to warrant the granting of the writ are not in fact of such importance, but are in fact of the type which do not warrant the granting of the writ.

(1)

Petitioner for its first point under this Part II makes the following statement (p. 54, Petitioner's brief): "The Circuit Court of Appeals construed the Standard of necessity provided in Section 11 (b) (2) of the Public Utility Holding Company Act authorizing the Securties and Exchange Commission 'to require * * * that each registered holding company and each subsidiary company thereof, shall take such steps as the Commission shall find necessary * * *' as not to apply 'to the details of the plan' and held that that section did not require payment of redemption premiums on the 1919 bonds of Laclede Gas even though Laclede Gas continued as an operating company with sufficient funds to pay such premiums and the plan required such funds to be deposited in escrow, pending court decision."

In the case of New York Trust Co. v. Securities and Exchange Commission, supra, this Court denied certiorari. In the course of the opinion of the Circuit Court of Appeals the Court states at page 275:

> "The petitioners argue that even so the Commission was powerless to find as the subsection required that the payment of the bonds was 'necessary to effectuate

> the provisions of subsection (b).' If there were alternative ways to dispose of the bonds upon dissolution of the issuing corporation . . . obviously Congress gave the Commission the power subject to the review provided for its orders to decide what was necessary in each instance to effectuate the provisions of subsection (b)."

Since this point is substantially the same as the point made by Petitioner under this heading, and certiorari was denied in the case of New York Trust Co. v. Securities and Exchange Commission, it seems clear that certiorari should likewise be denied in this case.

(2)

Petitioner for its second point makes the following statement (p. 58, Petitioner's brief): "The Circuit Court of Appeals construed the exception clause of Section 11 (b) (2) of the Public Utility Holding Company Act to apply 'only to security holders continuing as such in the reorganized corporation' and not to security holders existing in the Company up to the time of the consummation of the reorganization plan."

In our opinion Petitioner misconstrues the holding. In fact, we believe the holding is that security holders may be either present security holders or future security holders. Certainly there is no more warrant for Petitioner's contention that it applies only to present security holders than there would be that it applied solely to future security holders. Whether it applies to present security holders or future security holders or both is not an important Federal question. Certainly Congress could not have had in mind in its general protection of investors that investors as of any particular period of time would be those subject to its protection.

Petitioner reaches the conclusion that, under the reasoning of the Circuit Court of Appeals, there is no change

that the Commission could not effect in the corporate structure of an operating company. We are unable to follow Petitioner's reasoning. We do not see how the holding that the words "security holders" include future security holders brings about this result. In any event, however, the Act clearly contemplates changes in the corporate structure of an operating company if for the purpose of fairly and equitably distributing voting power, and we do not see how an important question of construction is involved in this question.

(3)

Petitioner for its third point makes the following statement (p. 63, Petitioner's brief): "The Circuit Court of Appeals construes Section 26 (c) of the Public Utility Holding Company Act of 1935 as making illegal the contractual provision for redemption premiums and concludes that, therefore, the 1919 bondholders should be paid nothing above face value and accrued interest."

In the case of New York Trust Co. v. Securities and Exchange Commission, supra, certiorari was denied. We fail to see how the question involved under this ground can be any different in this case than it was in the case of New York Trust Company. We have already pointed out that the decision in this case is in accord with the decision of Otis & Co. v. Securities and Exchange Commission, supra, and it, accordingly, would seem immaterial whether the contract for the payment of premiums was held inapplicable because of dissolution of the company, or because of the impact of Section 11 (b). In any event, the importance of the question would seem the same, and since certiorari was denied in the case of New York Trust Co. v. Securities and Exchange Commission, we can see no ground for plaintiff's argument on this point.

(4)

Petitioner for its fourth point makes the statement (p. 67 Petitioner's Brief): "The District Court did not independently determine whether the reorganization plan proposed was fair and equitable and appropriate to effectuate the provisions of Section 11 of the Public Utility Holding Company Act of 1935 as required by Section 11 (e) of the Act. The Circuit Court of Appeals did not reverse the District Court for failing to determine independently this question."

Section 24 (a) of the Act provides in part that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. Section 24 (a) by its terms is applicable to a review of a decision in the Circuit Court of Appeals rather than to an enforcement proceeding under Section 11 (e) of the Act. The substantial evidence rule required by Section 24 (a) should be equally applicable to Section 11 (e). Certainly this Court has taken the position in many decisions that the findings and conclusions of commissions shall not be disturbed if they are supported by substantial evidence. We believe that Petitioner has confused certain decisions with respect to bankruptcy cases with the general rule prevailing with respect to review of commission decisions, and has completely ignored Section 24 (a) of the Act.

This Court made the following statement in Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 590, l. c. 602:

> "We held in Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 86 L. ed. 1037, 62 S. Ct. 736, supra, that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of 'pragmatic adjustments.' Id. 315 U. S. p. 586, 86 L. ed. 1049, 62

S. Ct. 736. And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act. Id. p. 586. Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. Cf. Los Angeles Gas & E. Corp. v. Railroad Commission, 289 U. S. 287, 304, 305, 314, 77 L. ed. 1180, 1191, 1192, 1197; West Ohio Gas Co. v. Public Utilities Commission, 294 U. S. 63, 70, 79 L. ed. 761, 768, 55 S. Ct. 316; West v. Chesapeake & P. Teleph. Co., 295 U. S. 662, 692, 693, 79 L. ed. 1640, 1657, 1658, 55 S. Ct. 894 (dissenting opinion). It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. Cf. Railroad Commission v. Cumberland Teleph. & Teleg. Co., 212 U. S. 414, 53 L. ed. 577, 29 S. Ct. 357; Lindheimer v. Illinois Tel. Co., supra (292 U. S., pp. 164, 169, 78 L. ed. 1191, 1193, 54 S. Ct. 658); Railroad Commission v. Pacific Gas & E. Co., 302 U. S. 388, 401, 82 L. ed. 319, 326, 58 S. Ct. 334."

We believe this statement indicates the general attitude of this Court with respect to commission findings, and certainly it cannot be said that there is an important Federal question left undecided and requiring action of this Court in view of the general law and the many holdings of this Court on the general subject.

III.

Petitioner states in Part III of its Argument that "the holding of the Circuit Court of Appeals that the Order of the Commission of May 20, 1943, is final, is in conflict with decisions by Circuit Courts of Appeal for the Second and Third Circuits" (p. 74, Petitioner's brief).

Petitioner further states (p. 79, Petitioner's brief) that "the Court of Appeals and the District Court below hold that the Petitioner cannot raise objections in an enforcement proceeding, because the order of May 20, 1943, was unappealed from and became final," and that this "holding is in direct conflict with holdings in both the Second, Third and Sixth Circuits." There was in fact no such holding, nor did Petitioner ever attempt to review the order of May 20, 1943. Petitioner did in fact raise objections in this proceeding, which is an enforcement proceeding, and has had full opportunity to object to the payment of the 1919 Bonds at the principal amount thereof without premium.

The description by the District Court of the Commission Order of May 20, 1943, as final since unappealed from, and the approval of that description by the Circuit Court of Appeals in the instant case are in the nature of obiter dictum and are not necessary to the Courts' holdings. The question before the District Court was whether the plan before the Court and in the particular objected to was an involuntary one. The terms of the mortgage provided for payment of the premium "If the Company shall elect to redeem any of the bonds * * *" (R. p. 121). The District Court found "no basis for overruling the findings of the Commission that the Plan now before the Court and in the particulars objected to is an involuntary plan submitted under legal compulsion to comply with the mandate of the Act and the ruling of the Commission" (R. p. 118). The Court based this finding on the Conclusion of Law that the

retirement of the bonds was attributable to Section 11 of the Act and hence not voluntary (R. p. 133). It reached this Conclusion of Law through several lines of reasoning. It held that the compulsion of the Commission's Order of May 20, 1943, which Order it found had become final (R. p. 110), rendered the Plan involuntary. It found that Ogden's plan, submitted as predecessor of Utilities Power & Light Company, was not voluntary but pursuant to the legal compulsion of the direction of the Commission and a Federal court, and held that plan inseparable from Laclede's plan (R. p. 112). It ruled that the retirement of the bonds was necessitated by the compulsion of the Commission's Order to Ogden to dispose of its holdings in Laclede Gas and Laclede Electric (R. p. 112). It found that the retirement of the bonds was necessary to implement Ogden's divestment of its interests in Laclede Gas and Laclede Electric by rendering their securities and property salable (R. p. 113-114). It held that the Plan was involuntary because of the compusion of the Act (R. p. 117).

The District Court phrased the question "* * * if retirement of 1919 bonds results from legal compulsion, the condition upon which payment of the premium becomes due under the bond or mortgage contract does not exist" (R. p. 113). It held that the Plan was involuntary, having been submitted under legal compulsion, and the retirement of the bonds was compelled legally, and hence not an election by the Company to redeem the bonds. Therefore, the District Court's decision of the finality of the Commission's Order of May 20, 1943, is not decisive since, as has been demonstrated, there was other ample basis for the Court's findings that the Plan was involuntary, having been submitted under legal compulsion. The Circuit Court of Appeals in affirming the District Court's decision accepted the same bases for finding that the retirement of the bonds under the Plan was involuntary. The question

of whether the Commission's Order of May 20, 1943, was final was not decisive in either Courts' finding of the existence of legal compulsion. .

Petitioner is not objecting to the substance of Commission's Order of May 20, 1943; it objects solely to the Courts' statements that the Order had become final. Since, as has been demonstrated, these statements are not decisive in the instant case, then the question of the final or interlocutory nature of the Order was not the compelling factor in the Courts' decisions, and hence not a source of conflict among the decisions of the Circuit Courts of Appeal.

Furthermore, we do not believe there is in fact a conflict between the instant case and those cases cited by Petitioner in part III of its brief. We do not think a full discussion of this question would be helpful to this Court since it is clear, as pointed out above, that the order of May 20, 1943 only has importance as one of the several factors bringing about the finding that the payment of the 1919 bonds at the principal amount thereof without premium was involuntary rather than voluntary.

Petitioner might properly say there was a conflict if some other Circuit had determined on a substantially similar state of facts that the premium must be paid. However, that is not the case, for in both the case of New York Trust Company v. Securities and Exchange Commission, supra, Second Circuit, and the case of City National Bank & Trust Company of Chicago v. Securities and Exchange Commission, 7 C. C. A. (1943), 134 Fed. (2) 65, the Circuit Courts upheld plans as fair and equitable which called for payment of the principal amount of the bonds in question without premium.

CONCLUSION.

In conclusion, we submit that the decision of the Circuit Court of Appeals is in accord with the applicable decisions of this Court; not in conflict with the decisions

of the courts of other circuits; and that the questions determined by the Circuit Court of Appeals, which have not heretofore been passed upon by this Court, are not of sufficient importance to warrant this Court granting a writ of certiorari.

Respectfully submitted,

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